

No. 2400

United States
Circuit Court of Appeals

For the Ninth Circuit.

OREGON & CALIFORNIA RAILROAD COM-
PANY, a Corporation, et al.,
Defendants and Appellants,
JOHN L. SNYDER, et al.,
Cross-complainants and Appellants,
WILLIAM F. SLAUGHTER, et al.,
Interveners and Appellants,

vs.

THE UNITED STATES OF AMERICA,
Appellee.

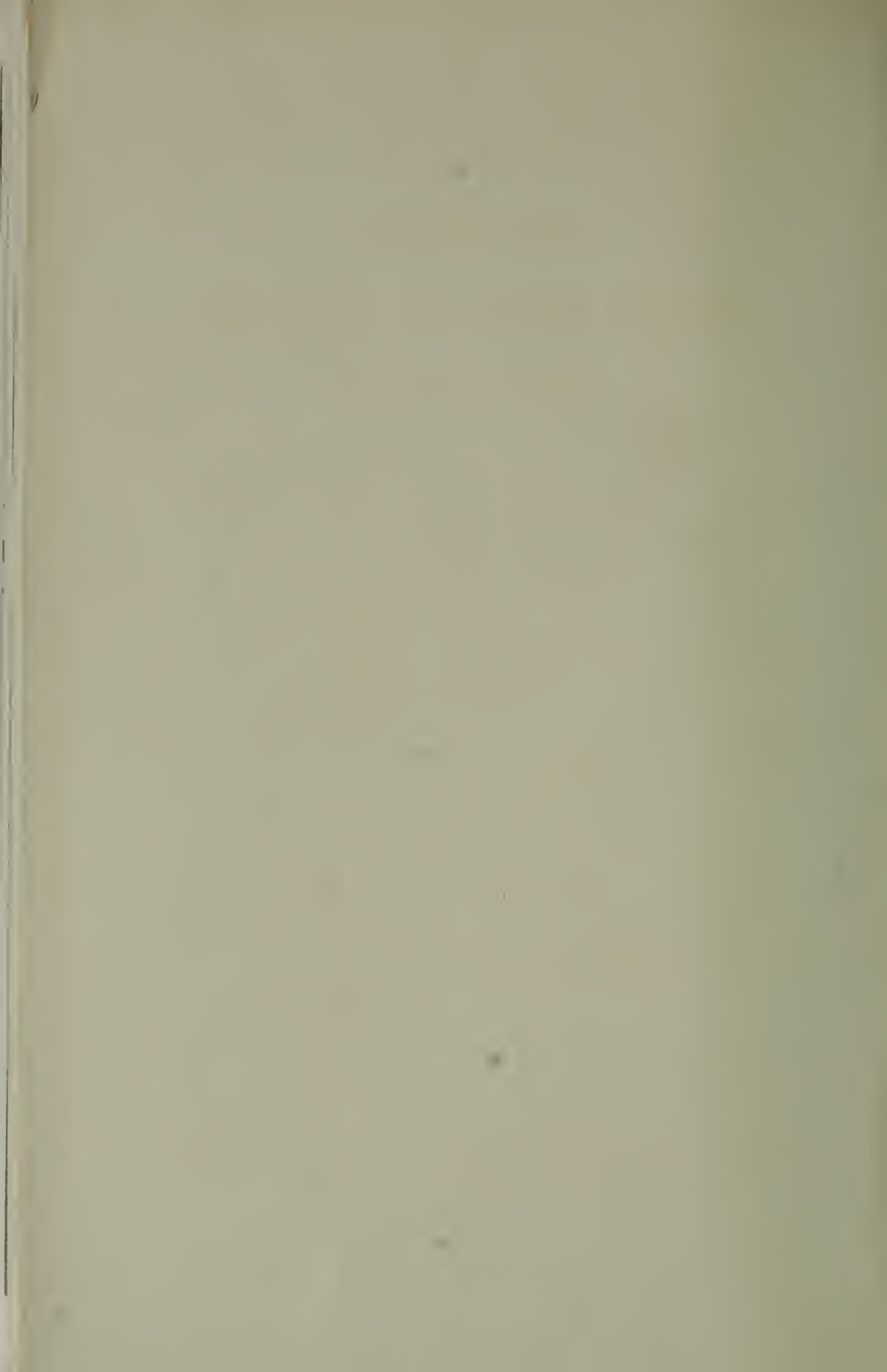
Appeal from the District Court of the United States
for the District of Oregon.

Certificate of the United States Circuit Court of Appeals
for the Ninth Circuit, Certifying Certain Questions or
Propositions of Law to the Supreme Court of
the United States Under Section 239 of
the Judicial Code (36 Stat. 1157.)

Filed

OCT 14 1914

F. D. Monckton,
Clerk.



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Appellee.

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for the District of Oregon.

**Names and Addresses of Solicitors Upon This
Appeal.**

For Appellants OREGON AND CALIFORNIA
R. R. CO., et al.:

WM. F. HERRIN, San Francisco, Cal.

P. F. DUNNE, San Francisco, Cal.

WM. D. FENTON, Portland, Oregon.

For Appellant UNION TRUST COMPANY:

DOLPH, MALLORY, SIMON & GEARIN,
Portland, Oregon.

MILLER, KING, LANE & TRAFFORD, and
JOHN C. SPOONER, New York.

For Appellants JOHN L. SNYDER, et al.:

A. W. LAFFERTY, Portland, Oregon.

For Appellants WILLIAM F. SLAUGHTER, et al.:

L. C. GARRIGUS, Portland, Oregon.

A. W. LAFFERTY, Portland, Oregon.

MOULTON & SCHWARTZ, Portland, Oregon.

DAY & BREWER, Seattle, Washington.

A. C. WOODCOCK, Eugene, Oregon.

For Appellee:

JAMES C. McREYNOLDS, Attorney General.

CLARENCE L. REAMES, U. S. District At-
torney for Oregon.

CONSTANTINE J. SMYTH, B. D. TOWN-
SEND, F. C. RABB, Special Assistants to
the Attorney General.

Certificate of the United States Circuit Court of Appeals for the Ninth Circuit, Certifying Certain Questions or Propositions of Law to the Supreme Court of the United States Under Section 239 of the Judicial Code (36 Stat. 1157).

Whereas, the complainant in the above entitled cause, appellee herein, on September 4, 1908, filed its Bill of Complaint against the defendants and appellants, and cross-complainants, appellants herein, which said Bill of Complaint, with the exhibits made a part thereof, is set out in Volume I, pp. 1-540, both inclusive, Record, to which reference is here made and which is made a part hereof; and

Whereas, thereafter, cross-complainants, on January 15, 1909, filed in said cause their cross-complaints, a typical one of which is the cross-complaint of John L. Snyder and others, which is set out in Volume II, pp. 640,676, both inclusive, Record, to which reference is here made and which is made a part hereof; and

Whereas, on March 2, 1909, B. W. Nunally and others were allowed to file their petition in intervention, which is set out in Volume II, pp. 541-638, both inclusive, Record, to which reference is here made and which is made a part hereof; and which petition in intervention is typical of the petitions in intervention of all other interveners herein; and

Whereas, on December 7, 1908, the defendants and appellants, Oregon and California Railroad Company, Southern Pacific Company and Stephen T. Gage, individually and as trustee, filed their joint

and several demurrer to the Bill of Complaint herein, which demurrer is set out in Volume II, pp. 677-681, both inclusive, Record, to which reference is here made and which is made a part hereof; and

Whereas, on February 13, 1909, the defendants and appellants, Oregon and California Railroad Company, Southern Pacific Company, and Stephen T. Gage, individually and as trustee, filed their joint and several demurrer to the cross-complaint of John L. Snyder and others, which said demurrer is set out in Volume II, pp. 688 to 691, both inclusive, Record, to which reference is here made and which is made a part hereof; and

Whereas, the defendants and appellants, Oregon and California Railroad Company, Southern Pacific Company, and Stephen T. Gage, individually and as trustee, on April 7, 1909, filed their joint and several demurrer to the petition in intervention of B. W. Nunally and others, which said demurrer is set out in Volume II, pp. 685-687, both inclusive, Record, to which reference is here made and which is made a part hereof; and

Whereas, on March 1, 1909, the Union Trust Company filed its demurrer to the cross-complaint of John L. Snyder and others, which said demurrer is set out in Volume II, pp. 682-684, both inclusive, Record, to which reference is here made and which is made a part hereof; and

Whereas, the said demurrer of the Oregon and California Railroad Company, Southern Pacific Company, and Stephen T. Gage, individually and as trustee, to the cross-complaint of John L. Snyder and

others is typical of the demurrer filed to each of the cross-complaints of all cross-complainants, appellants herein; and

Whereas, the demurrer of the Oregon and California Railroad Company, Southern Pacific Company, and Stephen T. Gage, individually and as trustee, filed to the petition in intervention of B. W. Nunally and others is typical of the demurrer filed to each of the petitions in intervention of all other interveners herein; and

Whereas, the demurrer of the Union Trust Company to the cross-bill of John L. Snyder and others is typical of the demurrer filed by the Union Trust Company to the cross-complaints of all other cross-complainants, appellants herein; and

Whereas, said several demurrers were argued and submitted to the Court by the respective solicitors and counsel of the various parties herein on March 13, 1909, and thereafter on April 24, 1911, said Court made an order overruling the joint and several demurrer of the Oregon and California Railroad Company, Southern Pacific Company, and Stephen T. Gage, individually and as trustee, to the Bill of Complaint herein, and sustained the demurrer of the Oregon and California Railroad Company, Southern Pacific Company, and Stephen T. Gage, individually and as trustee, to the cross-complaint of John L. Snyder and others, and sustained a like demurrer to the cross-complaint of all other cross-complainants, appellants herein, and sustained the demurrer of the Oregon and California Railroad Company, Southern Pacific Company, and Stephen T. Gage,

individually and as trustee, to the petition in intervention of B. W. Nunally and others, and sustained a like demurrer of the said Oregon and California Railroad Company, Southern Pacific Company, and Stephen T. Gage, individually and as trustee, to each of the petitions in intervention of all other interveners herein, and sustained the demurrer of the Union Trust Company to the cross-bill of John L. Snyder and others, and sustained a like demurrer to the cross-bill of each of the other cross-complainants; and

Whereas, the Court at the time it so made the said order as to each of the said several demurrers, filed an opinion, which is set out in Volume II, pp. 696-855, both inclusive, Record, to which reference is here made and which is made a part hereof; and

Whereas, within the time allowed by the Court, the defendants and appellants, Oregon and California Railroad Company, Southern Pacific Company, and Stephen T. Gage, individually and as trustee, on September 5, 1911, duly filed in said Court their joint and several answer, which, as amended September 8, 1911, and April 28, 1913, by leave of said Court, is set out in Volume II, pp. 859-1155, both inclusive, Record, to which reference is here made and which is made a part hereof; and

Whereas, the Union Trust Company on January 2, 1912, and within the time allowed by the Court, duly filed its amended answer as amended April 28, 1913, which said amended answer is set out in Volume III, pp. 1165-1280, both inclusive, Record, to which refer-

ence is here made and which is made a part hereof; and

Whereas, on November 1, 1911, the complainant filed its replication to the amended answer of the Oregon and California Railroad Company, Southern Pacific Company and Stephen T. Gage, individually and as trustee, which said replication is set out in Volume III, p. 1281, Record, to which reference is here made and which is made a part hereof; and on November 3, 1911, filed its replication to the amended answer of the Union Trust Company, which said replication is set out in Volume III, p. 1282, Record, to which reference is here made and which is made a part hereof; and

Whereas, thereafter, on February 8, 1912, said Court made an order appointing Margaret E. Fleming special examiner to take and report the testimony in said cause, and thereafter said testimony was duly taken and returned into Court within the time allowed by the order thereof, which said testimony has been preserved in the Transcript of Record in said cause in a "Statement of the Evidence" duly prepared and filed in and approved by said Court, which "Statement of the Evidence," with all the exhibits therein referred to, is set out commencing with Volume IV, p. 1551, and ending with Volume XV, p. 7920, Record; and

Whereas, said Court, on July 1, 1913, entered a decree in said cause in favor of the complainant and against the defendants, appellants herein, and against the cross-complainants, appellants herein, and interveners, appellants herein, whereby it was ordered, ad-

judged and decreed, among other things, as follows:

I.

“That all of those certain lands and estates in lands hereinafter described have become, and now are, forfeited to, and the title to all of said lands and estates in lands has reverted to, and now is revested in the United States of America, and all of said lands and estates in lands now are the absolute property of the United States of America, free from any and all claim or claims of right, title, interest or lien, in, to or upon the same or any part thereof, by or in favor of the defendants, cross-complainants and interveners herein or either or any of them, or any party or parties claiming under them or either or any of them.

II.

That the title of the United States of America to all of said lands and estates in lands be, and the same hereby is, quieted and confirmed, and particularly as to any and all claim or claims of right, title, interest or lien in, to or upon the same or any part thereof, by or in favor of the defendants, cross-complainants and interveners herein, and each and every of them, and each and every party or parties claiming under them or either or any of them.

III.

That each and all of the defendants, cross-complainants and interveners herein, and their respective officers and agents, be, and they and each of them hereby are, forever enjoined and restrained from in any manner claiming or asserting any right, title, interest or lien in, to or upon the aforesaid lands and

estates in lands, or any part thereof; and from in any manner selling, conveying, leasing or disposing of, any of said lands or estates in lands, or any interest therein; and from negotiating, executing or recording any document or instrument, and from doing any other act or thing, which shall in any manner affect or encumber the title to said lands or estates in lands, or any part thereof; and from going upon said lands or any part thereof; and from cutting, removing or in any manner using or injuring any of the timber or other natural products thereof; and from in any manner committing trespass upon said lands or any part thereof; and from in any manner using or interfering with said lands and estates in lands or any part thereof, or the title or possession thereof; and from contracting with, inviting, inducing or in any manner whatsoever permitting others to do any of the things aforesaid.”

Which decree is set out in Volume III, pp. 1296–1550, both inclusive, Record; and

Whereas, on said date said Court likewise made an order dismissing the cross-complaint of John L. Snyder and others, and all cross-complaints herein, and a like order dismissing the petition in intervention of B. W. Nunally and others, and the petitions in intervention of all other interveners, appellants herein; and

Whereas, the said defendants, appellants herein, and the cross-complainants, appellants herein, and the interveners, appellants herein, on August 29, 1913, duly filed in said Court their joint and several petition for appeal, which is set out in Volume XV,

pp. 7923-8020, both inclusive, Record, which said petition was on August 29, 1913, duly served upon the complainant herein and its solicitors of record in said cause; and said petition for allowance of appeal was on said day granted and said appeal allowed; and the joint and several bond of the said appellants filed in and approved by said Court; and

Whereas, in connection therewith, the Oregon and California Railroad Company, Southern Pacific Company, and Stephen T. Gage, individually and as trustee, and the Union Trust Company, individually and as trustee, defendants-appellants herein, and John L. Snyder and others, cross-complainants, appellants herein, and B. W. Nunally and others, interveners, appellants herein, duly and severally served and filed their separate and respective assignments of errors on said August 29, 1913, which said several assignments of errors are set out in Volume XV, pp. 8021-8076, both inclusive, pp. 8077-8137, both inclusive, pp. 8138-8198, both inclusive, pp. 8199-8221, both inclusive, pp. 8222-8282, both inclusive, pp. 8283-8391, both inclusive, Record; and

Whereas, citation on said joint and several appeal was duly issued out of said Court on August 29, 1913, and duly served upon the complainant and its solicitors on said date, which said citation with admission of service thereof is set out in Volume XVI, pp. 8425-8427, both inclusive, Record; and

Whereas, on November 11, 1913, the said John L. Snyder and others, defendants-cross-complainants-appellants herein, Wm. F. Slaughter and others, interveners-appellants herein, filed their petition for

a separate appeal, which is set out in Volume XVI, pp. 8428-8469, both inclusive, Record; which said petition for appeal was, after due service thereof on the complainant and upon the defendants-appellants herein, and upon their respective solicitors, duly granted and allowed by the Court; and

Whereas, on November 11, 1913, said cross-complainants and interveners filed their joint and several assignments of errors in connection with their said separate appeal, which are set out in Volume XVI, pp. 8470-8624, both inclusive, Record, together with due admission of service thereof upon the complainant and the defendant-appellants herein; and

Whereas, on March 14, 1914, a stipulation in writing was entered into between complainant and defendants, defendant-cross-complainants, and interveners, whereby, among other things, it was stipulated that the cross-appeal of the defendants-cross-complainants and interveners should be tried, heard and determined at the same time and upon the same record as in and upon the appeal of the defendants Oregon and California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, and Union Trust Company, individually and as trustee, and that said cross-appeal should be so tried, heard and determined upon said record, including any duly constituted, printed record of the said defendants-cross-complainants and interveners which may properly constitute the appeal papers upon the appeal; and whereby it was stipulated that:

“Any part of said record so to be printed on the

main appeal or upon the cross-appeal may be considered by the court, whether the same is printed as a part of the record on the main appeal or as part of the record on the cross-appeal. All questions raised by any joint Assignment of Error filed in the main appeal by the cross-complainants and the interveners therein shall be considered with and have like effect as though made and filed separately by each of the cross-complainants and interveners joining therein. In the separate or cross-appeal of the cross-complainants and interveners from the several orders of dismissal and from the judgment and decree entered herein, any questions raised by any joint Assignment of Error now filed herein by said cross-complainants and interveners, or either of them, shall be considered with and have like effect as though made and filed separately by each of the parties joining therein."

Whereas, an order was made pursuant to said stipulation on said date in accordance therewith, approving the same, which said stipulation and order are set out in Volume XVI, pp. 8652-8664, both inclusive, Record; and

Whereas, the time to file the record on appeal in said cause with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, and to docket said cause therein, was from time to time duly enlarged up to and including April 4, 1914, and pursuant to said orders the record on appeal, was within the time allowed by the order of the Court below and of the Judge thereof, duly filed in said United States Circuit Court of Appeals and said cause

docketed in said last named Court, which said record, printed as required by the rules of this Court, was duly certified by the Clerk of the District Court to this Court, and said cause thereafter and on May 29, 1914, came on for hearing upon said appeal, and was argued and submitted to the Court by the respective counsel of all the parties, and said argument was concluded and said cause submitted on June 1, 1914; whereupon the Court, after hearing said arguments, and having taken said cause under advisement, now on this — day of —, 1914, has determined that there are questions in this cause which, under the law, should be certified to the Supreme Court of the United States, pursuant to the provisions of Section 239 of the Judicial Code, (36 Stat. 1157, Chapter 231; U. S. Comp. Stat. Supp. 1911, page 228).

Whereupon the Court, being duly advised, makes the following Statement of Facts in connection therewith.

[Statement of Facts.]

The Act of July 25, 1866, (14 Stat. 239), is as follows:

“An Act granting Lands to aid in the Construction of a Railroad and Telegraph Line from the Central Pacific Railroad, in California, to Portland, in Oregon.”

“Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the ‘California and Oregon Railroad Company,’ organized under an act of the State of California, to protect certain parties in and

to a railroad survey, 'to connect Portland, in Oregon, with Marysville, in California,' approved April sixth, eighteen hundred and sixty-three, and such company organized under the laws of Oregon as the legislature of said State shall hereafter designate, be, and they are hereby, authorized and empowered to lay out, locate, construct, finish and maintain a railroad and telegraph line between the city of Portland, in Oregon, and the Central Pacific Railroad, in California, in the manner following, to-wit: The said California and Oregon Railroad Company to construct that part of the said railroad and telegraph within the State of California, beginning at some point (to be selected by said company) on the Central Pacific Railroad in the Sacramento Valley, in the State of California, and running thence northerly, through the Sacramento and Shasta valleys, to the northern boundary of the State of California; and the said Oregon company to construct that part of the said railroad and telegraph line within the State of Oregon; beginning at the City of Portland, in Oregon, and running thence southerly through the Willamette, Umpqua and Rogue River valleys to the southern boundary of Oregon, where the same shall connect with the part aforesaid to be made by the first-named company; Provided, That the company completing its respective part of the said railroad and telegraph from either of the termini herein named to the line between California and Oregon before the other company shall have likewise arrived at the same line, shall have the right, and the said company is hereby authorized, to continue in con-

structing the same beyond the line aforesaid, with the consent of the State in which the unfinished part may lie, upon the terms mentioned in this act, until the said parts shall meet and connect, and the whole line of said railroad and telegraph shall be completed.

Sec. 2. And be it further enacted, That there be, and hereby is, granted to the said companies, their successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores over the line of said railroad, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile (ten on each side) of said railroad line; and when any of said alternate sections or parts of sections shall be found to have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of, other lands, designated as aforesaid, shall be selected by said companies in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections designated by odd numbers as aforesaid, nearest to and not more than ten miles beyond the limits of said first-named alternate sections; and as soon as the said companies, or either of them, shall file in the office of the Secretary of the Interior a map of the survey of said railroad, or any portion thereof, not less than sixty continuous miles from either terminus, the Secretary of the Interior shall withdraw from sale public lands herein granted on each side of said railroad, so far as located and within the limits before specified. The lands

herein granted shall be applied to the building of said road within the States, respectively, wherein they are situated. And the sections and parts of sections of land which shall remain in the United States within the limits of the aforesaid grant shall not be sold for less than double the minimum price of public lands when sold; Provided, that *bona fide* and actual settlers under the pre-emption laws of the United States may, after due proof of settlement, improvement, and occupation, as now provided by law, purchase the same at the price fixed for said lands at the date of such settlement, improvement, and occupation; And provided also, That settlers under the provisions of the homestead act, who comply with the terms and requirements of said act, shall be entitled, within the limits of said grant, to patents for an amount not exceeding eighty acres of the land so reserved by the United States, anything in this act to the contrary notwithstanding.

Sec. 3. And be it further enacted, That the right of way through the public lands be, and the same is hereby granted to said companies for the construction of said railroad and telegraph line; and the right, power, and authority are hereby given to said companies to take from the public lands adjacent to the line of said road, earth, stone, timber, water, and other materials for the construction thereof. Said right of way is granted to said railroad to the extent of one hundred feet in width on each side of said railroad where it may pass over the public lands, including all necessary grounds for stations, buildings, workshops, depots, machine-shops, switches, side-

tracks, turn-tables, water stations, or any other structures, required in the construction and operating of said road.

Sec. 4. And be it further enacted, That whenever the said companies, or either of them, shall have twenty or more consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated by this act, the President of the United States shall appoint three commissioners, whose compensation shall be paid by said company, to examine the same, and if it shall appear that twenty consecutive miles of railroad and telegraph shall have been completed and equipped in all respects as required by this act, the said commissioners shall so report under oath to the President of the United States, and thereupon patents shall issue to said companies, or either of them, as the case may be, for the lands hereinbefore granted, to the extent of and coterminous with the completed section of said railroad and telegraph line as aforesaid; and from time to time, whenever twenty or more consecutive miles of the said road and telegraph shall be completed and equipped as aforesaid, patents shall in like manner issue upon the report of the said commissioners, and so on until the entire railroad and telegraph authorized by this act shall have been constructed, and the patents of the lands herein granted shall have been issued.

Sec. 5. And be it further enacted, That the grants aforesaid are made upon the condition that the said companies shall keep said railroad and telegraph in repair and use, and shall at all times transport the

mails upon said railroad, and transmit despatches by said telegraph line for the government of the United States, when required so to do by any department thereof, and that the government shall at all times have the preference in the use of said railroads and telegraph therefor at fair and reasonable rates of compensation, not to exceed the rates paid by private parties for the same kind of service. And said railroad shall be and remain a public highway for the use of the government of the United States, free of all toll or other charges upon the transportation of the property or troops of the United States; and the same shall be transported over said road at the cost, charge, and expense of the corporations or companies owning or operating the same, when so required by the government of the United States.

Sec. 6. And be it further enacted, That the said companies shall file their assent to this act in the Department of the Interior within one year after the passage hereof, and shall complete the first section of twenty miles of said railroad and telegraph within two years, and at least twenty miles in each year thereafter, and the whole on or before the first day of July, one thousand eight hundred and seventy-five; and the said railroad shall be of the same gauge as the 'Central Pacific Railroad' of California, and be connected therewith.

Sec. 7. And be it further enacted, That the said companies named in this act are hereby required to operate and use the portions or parts of said railroad and telegraph mentioned in section one of this act for all purposes of transportation, travel, and com-

munication, so far as the government and public are concerned, as one connected and continuous line; and in such operation and use to afford and secure to each other equal advantages and facilities as to rates, time, and transportation, without any discrimination whatever, on pain of forfeiting the full amount of damage sustained on account of such discrimination, to be sued for and recovered in any court of the United States, or of any state, of competent jurisdiction.

Sec. 8. And be it further enacted, That in case the said companies shall fail to comply with the terms and conditions required, namely, by not filing their assent thereto as provided in section six of this act, or by not completing the same as provided in said section, this act shall be null and void, and all the lands not conveyed by patent to said company or companies, as the case may be, at the date of any such failure, shall revert to the United States. And in case the said road and telegraph line shall not be kept in repair and fit for use, after the same shall have been completed, Congress may pass an act to put the same in repair and use, and may direct the income of said railroad and telegraph line to be thereafter devoted to the United States, to repay all expenditures caused by the default and neglect of said companies or either of them, as the case may be, or may fix pecuniary responsibility, not exceeding the value of the lands granted by this act.

Sec. 9. And be it further enacted, That the said 'California and Oregon Railroad Company' and the said 'Oregon Company' shall be governed by the

provisions of the general railroad and telegraph laws of their respective States, as to the construction and management of the said railroad and telegraph line hereinbefore authorized, in all matters not provided for in this act. Wherever the word 'company' or 'companies' is used in this act it shall be construed to embrace the words 'their associates, successors, and assigns,' the same as if the words had been inserted, or thereto annexed.

Sec. 10. And be it further enacted, That all mineral lands shall be excepted from the operation of this act; but where the same shall contain timber so much of the timber thereon as shall be required to construct said road over such mineral land is hereby granted to said companies; Provided, That the term 'mineral land' shall not include lands containing coal and iron.

Sec. 11. And be it further enacted, That the said companies named in this act shall obtain the consent of the legislatures of their respective States, and be governed by the statutory regulations thereof in all matters pertaining to the right of way, wherever the said road and telegraph line shall not pass over or through the public lands of the United States.

Sec. 12. And be it further enacted, That Congress may at any time, having due regard for the rights of said California and Oregon railroad companies, add to, alter, amend, or repeal this act.

Approved July 25, 1866."

The Act of June 25, 1868, (15 Stat. 80) is as follows:

“An Act to amend an Act entitled, ‘An Act granting Lands to aid in the Construction of a Railroad and Telegraph Line from the Central Pacific Railroad, in California, to Portland, in Oregon.’ ”

“Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled; That section six of an act entitled, ‘An Act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad, in California, to Portland, in Oregon,’ approved July twenty-fifth, eighteen hundred and sixty-six, be so amended as to provide that instead of the times now fixed in said section, the first section of twenty miles of said railroad and telegraph shall be completed within eighteen months from the passage of this act, and at least twenty miles in each two years thereafter, and the whole on or before the first day of July, Anno Domini eighteen hundred and eighty.

Approved June 25, 1868.”

The Act of April 10, 1869, (16 Stat. 47) is as follows:

“An Act to amend an Act entitled, ‘An Act granting Lands to aid in the Construction of a Railroad and Telegraph Line from the Central Pacific Railroad, in California, to Portland, in Oregon,’ approved July twenty-five, eighteen hundred and sixty-six.”

“Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section six of an act entitled,

‘An act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad, in California, to Portland, in Oregon,’ approved July twenty-five, eighteen hundred and sixty-six, be, and the same is hereby, amended so as to allow any railroad company heretofore designated by the legislature of the State of Oregon, in accordance with the first section of said act, to file its assent to such act in the Department of the Interior within one year from the date of the passage of this act; and such filing of its assent, if done within one year from the passage hereof, shall have the same force and effect to all intents and purposes as if such assent had been filed within one year after the passage of said act; Provided, That nothing herein shall impair any rights heretofore acquired by any railroad company under said act, nor shall said act or this amendment be construed to entitle more than one company to a grant of land: And provided further, That the lands granted by the act aforesaid shall be sold to actual settlers only, in quantities not greater than one-quarter section to one purchaser, and for a price not exceeding two dollars and fifty cents per acre.

Approved April 10, 1869.”

The Act of May 4, 1870, (16 Stat. 94) is as follows:

“An Act granting Lands to aid in the Construction of a Railroad and Telegraph Line from Portland to Astoria and McMinnville, in the State of Oregon.”

“Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That for the purpose of aiding in

the construction of a railroad and telegraph line from Portland to Astoria, and from a suitable point of junction near Forest Grove to the Yamhill River, near McMinnville, in the State of Oregon, there is hereby granted to the Oregon Central Railroad Company, now engaged in constructing the said road, and to their successors and assigns, the right of way through the public lands of the width of one hundred feet on each side of said road, and the right to take from the adjacent public lands materials for constructing said road, and also the necessary lands for depots, stations, side tracks, and other needful uses in operating the road, not exceeding forty acres at any one place; and, also, each alternate section of the public lands, not mineral, excepting coal or iron lands, designated by odd numbers nearest to said road, to the amount of ten such alternate sections per mile, on each side thereof, not otherwise disposed of or reserved or held by valid pre-emption or homestead right at the time of the passage of this act. And in case the quantity of ten full sections per mile cannot be found on each side of said road, within the said limits of twenty miles, other lands designated as aforesaid shall be selected under the direction of the Secretary of the Interior on either side of any part of said road nearest to and not more than twenty-five miles from the track of said road to make up such deficiency.

Sec. 2. And be it further enacted, That the commissioner of the general land office shall cause the lands along the line of the said railroad to be surveyed with all convenient speed. And whenever and as

often as the said company shall file with the Secretary of the Interior maps of the survey and location of twenty or more miles of said road, the said Secretary shall cause the said granted lands adjacent to and coterminous with such located sections of road to be segregated from the public lands; and thereafter the remaining public lands, subject to sale within the limits of the said grant, shall be disposed of only to actual settlers at double the minimum price for such lands: And provided also, That settlers under the provisions of the homestead act who comply with the terms and requirements of said act, shall be entitled, within the said limits of twenty miles, to patents for an amount not exceeding eighty acres each of the said ungranted lands, anything in this act to the contrary notwithstanding.

Sec. 3. And be it further enacted, That whenever and as often as the said company shall complete and equip twenty or more consecutive miles of the said railroad and telegraph, the Secretary of the Interior shall cause the same to be examined, at the expense of the company, by three commissioners appointed by him; and if they shall report that such completed section is a first-class railroad and telegraph, properly equipped and ready for use, he shall cause patents to be issued to the company for so much of the said granted lands as shall be adjacent to and coterminous with the said completed sections.

Sec. 4. And be it further enacted, That the said alternate sections of land granted by this act, excepting only such as are necessary for the company to reserve for depots, stations, side tracks, wood

yards, standing ground, and other needful uses in operating the road, shall be sold by the company only to actual settlers, in quantities not exceeding one hundred and sixty acres or a quarter section to any one settler, and at prices not exceeding two dollars and fifty cents per acre.

Sec. 5. And be it further enacted, That the said company shall, by mortgage or deed of trust to two or more trustees, appropriate and set apart all the net proceeds of the sales of the said granted lands, as a sinking fund, to be kept invested in the bonds of the United States, or other safe and more productive securities, for the purchase from time to time, and the redemption at maturity, of the first mortgage construction bonds of the company, on the road depots, stations, side tracks, and wood yards, not exceeding thirty thousand dollars per mile of road, payable in gold coin not longer than thirty years from date, with interest payable semi-annually in coin not exceeding the (rate) of seven per centum per annum; and no part of the principal or interest of the said fund shall be applied to any other use until all the said bonds shall have been purchased or redeemed and cancelled; and each of the said first mortgage bonds shall bear the certificate of the trustees, setting forth the manner in which the same is secured and its payment provided for. And the district court of the United States, concurrently with the State courts, shall have original jurisdiction, subject to appeal and writ of error, to enforce the provisions of this section.

Sec. 6. And be it further enacted, That the said company shall file with the Secretary of the Interior

its assent to this act within one year from the time of its passage; and the foregoing grant is upon condition that said company shall complete a section of twenty or more miles of said railroad and telegraph within two years, and the entire railroad and telegraph within six years, from the same date.

Approved May 4, 1870."

On January 3, 1913, the complainant and the defendants appellants Oregon and California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as Trustee, and Union Trust Company, individually and as trustee, made and filed in said cause, as a part of the evidence therein, a "Stipulation as to the Facts," in substance as follows:

On July 25, 1866, Congress passed an Act entitled, "An Act granting lands to aid in the Construction of a Railroad and Telegraph Line from the Central Pacific Railroad, in California, to Portland, in Oregon," which act was approved and became operative on July 25, 1866, and that said act was amended by an Act of Congress approved June 25, 1868, hereinbefore set out, and that a copy of the Articles of Incorporation of the Oregon Central Railroad Company of Portland, Oregon, is as follows:

Know all Men by These Presents, That we, the undersigned citizens of the State of Oregon, do hereby associate ourselves together as a private incorporation, under and by virtue of the General Incorporation law of said State.

1st.

The corporation hereby created shall be known as

the "Oregon Central Railroad Company," and its duration unlimited.

2nd.

The object and business of the corporation shall be to construct and operate a railroad from the City of Portland, through the Willamette Valley to the southern boundary of the State; under the laws of Oregon, and the law of Congress recently passed granting land and aid for such purpose.

3rd.

The corporation shall have its principal office in the City of Portland.

4th.

The capital stock of said corporation shall be five million dollars, divided into general, and preferred interest-bearing stock, in such proportions as the incorporators, or board of directors, may deem proper.

5th.

The amount of each share of the capital stock shall be one hundred dollars.

The termini of the railroad proposed to be constructed by said company, shall be for the northern end, at the City of Portland, and for the southern end at some point on or near the southern boundary of the State, as may be hereafter determined by actual survey.

In Witness Whereof we have here set our hands and seals this —— day of September, A. D. 1866.

J. S. SMITH	Seal.
I. R. MOORES	Seal.
J. H. MITCHELL	Seal.
E. D. SHATTUCK	Seal.
JESSE APPLGATE	Seal.
F. A. CHENOWETH	Seal.
JOEL PALMER	Seal.
H. W. CORBETT	Seal.
M. M. MELVIN	Seal.
GEO. L. WOODS	Seal.
R. R. THOMPSON	Seal.
J. C. AINSWORTH	Seal.
S. G. REED	Seal.
JOHN McCRACKEN	Seal.
C. H. LEWIS	Seal.
B. F. BROWN	Seal.
T. H. COX	Seal.
J. GASTON	Seal.

(Five cents in Revenue Stamps, canceled.)

State of Oregon, Marion County,—ss.

Be it known that the persons whose names are attached to the foregoing Articles of Incorporation, appeared before me, the undersigned, a Notary Public for and within said county and state, respectively, and at the time and places herein named, to-wit, J. S. Smith, I. R. Moores, J. H. Mitchell, E. D. Shattuck, Jesse Applegate, F. A. Chenoweth, Joel Palmer, and H. W. Corbett at Salem, in said State, on or about the 29th day of September, 1866, and M. M. Melvin, at Salem, on or about October 23rd, 1866, and George

L. Woods, at Salem, on or about November 10, 1866, and R. R. Thompson, J. C. Ainsworth, S. G. Reed, Jno. McCracken, and C. H. Lewis, at Portland, Oregon, on the 16th day of November, 1866; and they the said several subscribing persons to the aforesaid Articles of Incorporation did then and there, at the several times set forth in this certificate, sign and seal said articles before me and in my presence, and acknowledged the said signing and sealing to be their voluntary act and deed for the purposes set forth in said articles.

In Witness Whereof, I have here set my signature as said Notary Public and attached my official seal this 16th day of November, A. D. 1866.

(Official Seal)

J. GASTON,
Notary Public.

(Five cents in Revenue Stamps, canceled.)

State of Oregon, County of Marion,—ss.

On this 20th day of November, A. D. 1866, before me, a Notary Public in and for said county, personally came the within named B. F. Brown, Thos H. Cox, and J. Gaston, who are personally known to me to be the identical persons whose names are subscribed to the within instrument, and acknowledged to me that they signed the same for the purposes therein set forth.

Witness my hand and seal of office this 20th day of November, A. D. 1866.

(Seal)

SETH R. HAMMER,
Notary Public.

(Endorsed)

Filed in the office of the Secretary of State this 21st

day of November, A. D. 1866, at 10½ o'clock A. M.

SAMUEL E. MAY,
Secretary of State.

The original of said last mentioned document was presented to the Secretary of State on October 6, 1866, by Joseph Gaston, who requested the Secretary to file the same and permit him (Gaston) to immediately withdraw it for exhibition to the legislature or Oregon, then in session. Whereupon the Secretary of State wrote with a lead pencil, the date "October 6, 1866," on the back of said document, or on an envelope containing same, and Gaston immediately departed with said document and envelope in his (Gaston's) possession, and it was not returned to the Secretary of State's office until November 21, 1866. At the time said document was presented to said Secretary, no certificate or certificates of acknowledgment were appended thereto, and the only signatures thereon were those of J. S. Smith, I. R. Moores, J. H. Mitchell, E. D. Shattuck, Jesse Applegate, F. A. Chenoweth, Joel Palmer and H. W. Corbett. At the time said document was returned to the Secretary of State's office on November 21, 1866, it was in the form set forth above.

The said Oregon Central Railroad Company (of Portland) projected its railroad line from the City of Portland in a westerly direction to the village of Forest Grove, and thence southerly to and beyond the village of McMinnville, on the westerly side of the Willamette River, from which circumstances the said company became known as, and is hereinafter designated and referred to as the "West Side Company,"

and its railroad line became known as the "West Side Line."

On October 10, 1866, the legislature of the State of Oregon adopted, and the Governor of said state approved, Joint Resolution as follows:

"Whereas, The Congress of the United States, at its last session, passed an act granting land to aid in the construction of a railroad and telegraph from the Central Pacific Railroad in California, to Portland, Oregon, and made it the duty of the Legislative Assembly of the State of Oregon to designate the company, organized under the laws of Oregon, which shall receive that part of said land grant lying within the State of Oregon; therefore, be it

"Resolved by the House, the Senate Concurring, That the 'Oregon Central Railroad Company,' a company organized under the general incorporation laws of this State, be and the same is hereby designated as the company which shall be entitled to receive the land granted and all the benefits of an Act of Congress approved July 25, 1866, entitled, 'An Act granting land to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California, to Portland, Oregon,' so far as the said grant applies to the State of Oregon."

The West Side Company, assuming itself to have been lawfully designated thereby, on May 25, 1867, through its Board of Directors, adopted a resolution assenting to said Act of Congress approved July 25, 1866, and on July 6, 1867, filed a certified copy of said resolution in the office of the Secretary of the Interior, together with a certified copy of its Articles of Incorporation, and a certified copy of the said Joint

Resolution of the legislature of the State of Oregon, and on or about August 20, 1868, the West Side Company filed in the Department of the Interior a map of survey of its said projected line of railroad, a copy whereof, on a reduced scale, is referred to and made a part of the Stipulation, as Exhibit No. 2, and is set out in Volume IV, p. 1629, Record, to which reference is here made, and which is made a part hereof.

On April 22, 1867, the original Articles of Incorporation of the Oregon Central Railroad Company (of Salem) were filed in the office of the Secretary of State of the State of Oregon, a correct copy of which said Articles is as follows:

Know all Men by These Presents, That we, J. H. Moores, Geo. L. Woods, S. Ellsworth, by Geo. L. Woods, his Attorney, I. R. Moores, E. N. Cooke and J. S. Smith, by I. R. Moores, their Attorney, and Samuel A. Clarke, have this day incorporated ourselves under and in accordance with the laws of Oregon, and we adopt the following as our Articles of Incorporation.

ARTICLE FIRST.

This corporation shall be known as and do business under the name of the OREGON CENTRAL RAILROAD COMPANY.

ARTICLE SECOND.

The enterprise, occupation and business for which the company incorporates is to construct a railroad with all the necessary branches, fixtures, buildings and appurtenances from Portland, in Oregon, southerly about three hundred miles to the California line, to maintain the said road; in good condition and repair, and to employ the same in the transportation

of freight and passengers and freight.

ARTICLE THIRD.

The principal office for the transaction of the business of the Company shall be kept at the City of Salem, Marion County, Oregon.

ARTICLE FOURTH.

The capital stock of the OREGON CENTRAL RAILROAD COMPANY shall be fixed at Seven Million Two Hundred and Fifty Thousand Dollars (\$7,250,000.00).

ARTICLE FIFTH.

The number of shares of the capital stock shall be Seventy-two Thousand Five Hundred (72,500) and the amount of each share of the stock shall be One Hundred Dollars (\$100.00).

ARTICLE SIXTH.

The period of time during which the company shall remain in operation is not limited as to duration.

In testimony of our adoption of the foregoing Articles of Incorporation, witness our hands and seals this the twenty-second day of April, A. D. 1867.

JOHN H. MOORES. (Seal)

GEO. L. WOODS. (Seal)

S. ELLSWORTH.

By GEO. WOODS, Atty. (Seal)

I. R. MOORES. (Seal)

I. S. SMITH.

Per I. R. MOORES, Atty. (Seal)

E. N. COOKE.

Per I. R. MOORES, Atty. (Seal)

SAM'L A. CLARKE. (Seal)

(Fifteen cents in revenue stamps cancelled.)

State of Oregon, Marion County—ss.

BE IT REMEMBERED that on this the twenty-second day of April, A. D. 1867, personally came before me, a Notary Public in and for said County and State, the within named I. R. Moores, Geo. L. Woods, I. R. Moores, for himself and also as Attorney in Fact for each of the following named persons: J. S. Smith and E. N. Cooke and S. Ellsworth, by Geo. L. Woods, his Atty. and S. A. Clarke, who severally acknowledged that they signed the within and foregoing instrument; in person or as Attorney, for the uses and purposes therein named.

In Witness Whereof I have hereunto set my hand and Notarial Seal this the day and year above written.

(Notarial Seal)

C. S. WOODWORTH,
Notary Public.

(Five cents in revenue stamps cancelled.)

(Endorsed)

Articles of Incorporation of Oregon Central R. R. Co. Filed in the office of the Secretary of State this 22nd day of April, A. D. 1867.

I. R. MOORES,
Acting Secy. of State.

On or about April 22, 1867, the persons whose names were subscribed to the said Articles of Incorporation, contending that the West Side Company was never lawfully incorporated or organized, and designing to secure the grants, franchises and other benefits of the said Act of Congress approved July 25, 1866, caused proceedings to be taken that were

intended to organize under the general incorporation laws of the State of Oregon, the Oregon Central Railroad Company (of Salem), named in the said Articles of Incorporation filed as aforesaid on April 22, 1867. The last mentioned Oregon Central Railroad Company (of Salem) projected its railroad line on the easterly side of the Willamette River, from which circumstance it became known as and is designated and referred to as the "East Side Company," and its railroad line became known as the "East Side Line."

The East Side Company, in furtherance of its aforesaid design, procured the legislature of the State of Oregon to adopt, and the Governor of said state to approve, on October 20, 1868, a Joint Resolution, correct copy of which is as follows:

"Whereas, The Congress of the United States, by an Act approved July 25, 1866, entitled, 'An Act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California, to Portland, in Oregon,' did grant certain lands in the State of Oregon, and confer certain benefits and privileges upon such company organized under the laws of Oregon as the Legislature of said State should thereafter designate; and

"Whereas, The Legislative Assembly of Oregon, at its fourth regular session, did adopt a joint resolution known as 'House Joint Resolution No. 13,' designating in terms the Oregon Central Railroad Company as the company entitled to receive the land granted by, and all the benefits and privileges of, the said Act of Congress; and

“Whereas, At the time of the adoption of the said joint resolution as aforesaid, no such company as the Oregon Central Railroad Company was organized or in existence, and the said joint resolution was adopted under a misapprehension of facts as to the organization and existence of such company; and

“Whereas, The designation of the company to receive the lands in the State of Oregon granted, and the benefits and privileges conferred by, the said Act of Congress, yet remains to be made;

“Be it Resolved by the Senate, the House Concurring, That the Oregon Central Railroad Company, a corporation organized at Salem on the twenty-second (22nd) day of April, in the year one thousand eight hundred and sixty-seven (1867) under and pursuant to the laws of the State of Oregon, be and the same is hereby designated as the company entitled to receive the lands in Oregon, and the benefits and privileges conferred by the said Act of Congress.”

A controversy arose between the West Side and the East Side companies, as to which of the said companies was entitled to the grants, franchises and other benefits of the said Act of Congress approved July 25, 1866, which continued until about January, 1870.

On April 10, 1869, Congress passed the Act of that date (16 Stat. 47), hereinbefore set out. On June 8, 1869, the East Side Company, through its Board of Directors, adopted a resolution, correct copy of which is as follows:

“Whereas, The Congress of the United States, on the 25th day of July, 1866, passed an Act entitled ‘An

Act to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California, to Portland, in Oregon,' and

“Whereas, Such Act provided that such company thereafter organized under the laws of Oregon, and designated by the Legislature of such State, should be entitled to receive and manage the said grant in Oregon, said Act further requiring that the company so organized and designated should, within one year from the date of its passage (to-wit: July 25, 1866), file its assent in the Department of the Interior, and

“Whereas, No company was designated by such Legislature within the year within which such an assent was required to be filed, and

“Whereas, The Legislature of the State of Oregon did, at its regular session in October, A. D. 1868, pass the following joint resolution, designating this company, to-wit, ‘The Oregon Central Railroad Company’ of Salem, Oregon, a company duly incorporated and organized under the laws of the State of Oregon, as the company to take and manage such grant, and receive all the benefits of the same, in the State of Oregon;

(Quoting in full said joint resolution, and which is hereinbefore set forth).

“And whereas, The Congress of the United States, in April, A. D. 1869, passed an Act amendatory of the said Act of July 25, 1866, extending the time in which the company designated might file its said assent, which Act was approved by the President of the United States, April 10, 1869, and is entitled, ‘An Act to amend an Act entitled ‘An Act granting

lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad, in California, to Portland, in Oregon,' approved July 25th, 1866;

"Therefore, Resolved, That this company, the Oregon Central Railroad Company, of Salem, Oregon, incorporated at Salem, Oregon, April 22, 1867, do hereby accept all the provisions, rights, privileges and franchises of said Act of July 25, A. D. 1866, entitled 'An Act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad, in California, to Portland, in Oregon,' and of all Acts amendatory thereof, and upon the conditions therein specified, and do hereby give our assent and the assent of such company thereto, and the Secretary of this company is hereby instructed to prepare a true copy of this resolution, certified to under the seal of the corporation, signed by himself as Secretary, and by the President of this company, and such certified copy transmit to and file the same with and in the office of the Secretary of the Interior at Washington City, D. C."

On June 30, 1869, the said company filed a certified copy of the said resolution in the Department of the Interior of the United States. On October 29, 1869, the East Side Company filed in the office of the Secretary of the Interior of the United States, a map of the survey and location of the first sixty miles of its projected line of railroad, extending southerly from Portland. On or about December 24, 1869, the East Side Company completed the construction of the first twenty miles of its said line of railroad, com-

mencing at Portland and extending southerly therefrom, and on December 31, 1869, the said twenty mile section of constructed railroad was approved by commissioners appointed pursuant to the provisions of Section four of the said Act of Congress of July 25, 1866, who had theretofore examined the same.

The original Articles of Incorporation of the Oregon and California Railroad Company were filed in the office of the Secretary of State of the State of Oregon, on March 17, 1870, a correct copy whereof is as follows:

“Know all Men by These Presents, That we, the undersigned corporators, Ben Holladay, of New York, and Cicero H. Lewis, I. R. Moores, J. C. Hawthorne, and Medorem Crawford, of the State of Oregon, do, by these presents, associate ourselves together as a corporation and body politic, under and by virtue of the general incorporation law of the State of Oregon, approved October 14, A. D. 1862, and amendments thereto, and for such purpose we do, jointly and severally, hereby agree to and with each other to the following articles:

ARTICLE I.

The name assumed by this corporation, and by which it shall be known, is the “Oregon and California Railroad Company.”

ARTICLE II.

The duration of this corporation shall be ninety-nine (99) years.

ARTICLE III.

The enterprise, business, pursuit and occupation in which this corporation proposes to engage, is to con-

struct a railroad and telegraph line, with all the necessary branches, side tracks, fixtures, buildings, depots, stations and appurtenances, from Portland, in the State of Oregon, and running thence southerly through the Willamette, Umpqua and Rogue River Valleys to the California line on the southern boundary line of Oregon to connect with the railroad and telegraph line now being constructed northerly through the State of California by the California and Oregon Railroad Company toward the southern boundary of Oregon; and to purchase, own, construct, hold, equip, operate and use all necessary ferries on the line of such road over the Willamette and other rivers, and over any river or rivers on either side of the line of such railroad which may be necessary or proper in crossing freight and passengers to and from the said railroad; to maintain the said railroad and telegraph line in good order, condition and repair, and to operate the said railroad and employ the same and the said telegraph line in the business of transporting passengers and freight and the United States mails, and for the purposes aforesaid to purchase, take and receive of and from the "Oregon Central Railroad Company," of Salem, Oregon, incorporated April 22, A. D. 1867, that portion of its railroad and telegraph line now completed, together with all the property, real, personal and mixed, and the right of way of such last named corporation, of whatsoever name and nature, and all its right and franchises of every name and nature, both legal and equitable, which the said last named corporation now has or owned, or to which

it is any way or manner entitled, or hereafter may be entitled to—whether the same is absolute or contingent, and particularly and especially all the right, title, interest, franchise, claim and demand which the said Oregon Central Railroad Company, of Salem, Oregon, aforesaid, now has or is entitled to, and to which it may hereafter be entitled under and by virtue of an Act of Congress entitled, ‘An Act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California, to Portland, in Oregon,’ approved July 25, 1866, and of all amendments thereto. The purpose of this incorporation being to make such portion of the railroad and telegraph line of said “Oregon Central Railroad Company” which is now completed, a part of the line of railroad and telegraph which this corporation proposes to construct, as aforesaid, from Portland, Oregon, to the California line, and to construct and establish the whole thereof from Portland, in Oregon, to said California line in all respects in accordance with the Act of Congress hereinbefore referred to, and the amendments thereto, and for the purpose of receiving all the benefits of such Act of Congress and amendments thereto, and intended to be conferred thereby on the Oregon Company, and for the purpose of complying with all the provisions of such Act.

ARTICLE IV.

The principal office for the transaction of the business of this corporation shall be kept at the city of Portland, Multnomah County, State of Oregon.

ARTICLE V.

The amount of the capital stock of this corporation is hereby fixed at Twenty Million (\$20,000,000) Dollars.

ARTICLE VI.

The amount of each share of such capital stock is hereby placed at One Hundred (\$100) Dollars.

In Testimony Whereof, And of our adoption of the foregoing Articles of Incorporation we, the undersigned corporators, have hereunto set our hands and seals this 16th day of March, A. D. 1870, in triplicate.

BEN HOLLADAY.

CICERO H. LEWIS.

I. R. MOORES.

J. C. HAWTHORNE.

MEDOREM CRAWFORD.

(Corporate Seal)

State of Oregon, County of Multnomah, ss.

Be it Remembered, that on this 16th day of March, A. D. 1870, personally appeared before me, the undersigned, a Notary Public in and for the county aforesaid, the above named corporators, Ben Holladay, Cicero H. Lewis, I. R. Moores, J. C. Hawthorne and Medorem Crawford, all to me personally known as being the persons named in, and who, as corporators, made and subscribed the foregoing Articles of Incorporation and severally acknowledged to me that they, and each of them, executed the foregoing Articles of Incorporation freely and voluntarily, and for the uses and purposes therein specified.

Witness my hand and official seal the day and year in this certificate first above written.

(Seal)

GEO. W. MURRAY,

Notary Public.

Said Articles of Incorporation of the Oregon and California Railroad Company were executed and filed in triplicate, one in the office of the Secretary of State of the State of Oregon, one in the office of the County Clerk of the County of Multnomah, Oregon (being the county in which the principal office of the said company was located), and one in the office of the Secretary of the said company, at the City of Portland, in the County of Multnomah. On March 29, 1870, the East Side Company executed and delivered to the Oregon and California Railroad Company an instrument in writing, a correct copy of which is attached to the bill of complaint, as Exhibit B, and which is set out in Volume I, pp. 93-125 Record, and which instrument was recorded in the office of the County Recorder of the several counties in which was situated any part of the lands intended to be granted by the said Act of Congress of July 25, 1866, which instrument, among other things, on its face recites that the Oregon Central Railroad Company (East Side Company) was on October 20, 1868, duly designated by the legislature of the State of Oregon, by Joint Resolution thereof, as the corporation to take, manage and receive the benefits of the Act of Congress approved July 25, 1866, and that the East Side Company did, afterwards, and in pursuance of said Act and all Acts amendatory thereof, and supplemental thereto, duly file its assent in writ-

ing, to said Act of Congress, and all the provisions thereof, in the office of and with the Secretary of the Interior of the United States, and that said East Side Company was recognized by the Department of the Interior as the corporation in Oregon entitled to take and manage the Congressional grant referred to, and that the East Side Company did afterwards proceed to locate the line of said railroad, and did locate the same for a long distance, and did prepare and file its maps in the office of the Secretary of the Interior, in strict accordance with the requirements of said Act of Congress of July 25, 1866, and amendments thereto, making such grants of land, and did, prior to December 25, 1869, fully and in all respects as required by said Acts of Congress and acts amendatory thereof and supplemental thereto, complete the construction of twenty miles of its railroad, commencing at East Portland, in Multnomah County, in the State of Oregon, and running thence in a southerly direction twenty miles and over, and did stock and equip the same in all respects as required by said Act of Congress, and that on December 31, 1869, commissioners appointed by the President of the United States under said Act of Congress of July 25, 1866, examined and reported upon the railroad and telegraph line, aforesaid, being built by said East Side Company, and did examine the said twenty miles of railroad and telegraph line, and did make their report thereon to the Government of the United States, as required by said Act of Congress approved July 25, 1866 making such land grant, and the Acts amendatory thereof and supplemental thereto, which re-

port was favorable, and the same was received and accepted by the Government of the United States, and the said twenty miles of railroad and telegraph line so completed and equipped were accepted by the said Secretary of the Interior of the United States, and the lands granted by the Acts, aforesaid, and to which the East Side Company was entitled by virtue of the Acts of Congress aforesaid, and the completion and acceptance of twenty miles of its road, were, by an order of the Secretary of the Interior, withdrawn from sale and private entry, and for the benefit of said East Side Company, its successors and assigns, as in and by said Acts of Congress is provided, and that the East Side Company had done large amounts of work toward the construction of its said road, and in addition to said twenty miles so completed, in locating and grading the track of the same, and had acquired divers personal property, rights of way, franchises, privileges, and interests, real, personal and mixed, both legal and equitable, absolute and contingent, and that the Oregon and California Railroad Company was incorporated and organized solely with a view to becoming the assignee of the property, rights and franchises and privileges of the East Side Company (for reasons appearing in the subsequent recitals of the conveyance) and for the purpose of carrying out to successful completion the railroad and telegraph line commenced and partly completed, as aforesaid; that the Oregon and California Railroad Company was incorporated and organized in strict accordance with, and with special reference to a full and complete compliance with the

said Act of Congress approved July 25, 1866, and acts amendatory thereof and supplemental thereto, which Articles were filed on March 17, 1870, in the office of the Secretary of State, and there remained of record, (which acts are made a part of the conveyance) and that on March 28, 1870, the East Side Company, by its Board of Directors, unanimously adopted a resolution reciting an offer of the Oregon and California Railroad Company to purchase from the East Side Company the railroad then partly completed and in progress of construction, including the rolling stock and other property connected therewith, and including all of the property of the East Side Company, or to which it might be in any wise entitled, and including also all franchises of that company which it then owned or to which it was or might be entitled by virtue of any act or resolution of Congress, or of the legislature of the State of Oregon, and proposing that in consideration of the conveyance, transfer and delivery of all its property to the Oregon and California Railroad Company, the latter company should agree to and with the directors and stockholders of the East Side Company to assume, and should assume and agree to pay, all the debts and liabilities of the East Side Company, as the same should mature and become due and payable, of whatsoever name and nature, and would indemnify and forever save and keep harmless the East Side Company from any and all such payments, and from all liability whatever, of every name and nature, for which the East Side Company might be liable at the date of the acceptance of the proposition. The deed

further recites that the East Side Company was on that date indebted in the sum of not less than \$800,000, nor more than \$1,000,000, in gold coin of the United States, and that the former sum was equivalent in value, under existing circumstances, to that of all the property and franchises owned or possessed by the East Side Company, or to which it might be in any wise entitled, and that there had theretofore existed divers controversies in the courts, and there was one suit still pending of a similar nature, wherein the right of the East Side Company to use its corporate name, had been and was then questioned by another company, and by reason whereof the securities of the East Side Company had been weakened and rendered comparatively valueless, and which had prevented the East Side Company and its contractors from negotiating the same, and from proceeding with the construction of its railroad, and which had resulted in the East Side Company being driven to a cancellation of its contracts for the construction thereof, and whereby it was resolved that it was the judgment of the Board of Directors of the East Side Company, that it was to the best interests of that company and of its stockholders to accept the proposition of the Oregon and California Railroad Company, as stated, and thereupon a resolution was adopted accepting such proposition, subject to a majority vote of the stock of the corporation, and the President and Secretary of the East Side Company were authorized and directed to enter into an agreement with the Oregon and California Railroad Company for a sale of all of the property and franchises

of the East Side Company, upon the terms embodied in the proposition, such agreement to be subject to the approval or disapproval of a majority of the stock of the East Side Company at a stockholders' meeting to be thereafter held. That pursuant to such resolution, an agreement in writing between the East Side Company and the Oregon and California Railroad Company was executed on March 28, 1870, and thereafter, on that date, a meeting of the stockholders of the East Side Company was duly called and held, and the action of the Board of Directors of the East Side Company ratified by a vote of over two-thirds of the capital stock of such corporation, and a resolution adopted by such stockholders, authorizing the dissolution of the East Side Company, and that its business be settled up, and that it was deemed advisable to sell, dispose of, assign, transfer and convey to the Oregon and California Railroad Company, all the property, real, personal and mixed, and all the franchises, rights, credits, privileges, and emoluments of whatsoever name and nature, owned by or in any wise belonging to the East Side Company, in accordance with the agreement of March 28, 1870, and that the East Side Company should thereupon, and was thereby dissolved, "to take effect upon the settlement of its business and the sale, transfer and conveyance of its property and franchises." It is recited in this conveyance that the East Side Company "has, in and for the consideration of the written covenants and agreements upon the part of the Oregon and California Railroad Company, to pay all the debts, demands and liabilities of this company, of every name and na-

ture, as the same mature or become due, and in and for the further consideration of the covenants of such corporation to forever save, indemnify and keep harmless this company from all claims and demands whatsoever, bargained and sold to such "Oregon and California Railroad Company" all the property, real and personal, rights and franchises, credits and interests, legal and equitable, determined, absolute and contingent, of every name and nature, now owned by or belonging to this corporation." The conveyance makes a further recital as follows: "Whereas, the present indebtedness of this company exceeds the sum of Eight Hundred Thousand (\$800,000) Dollars in U. S. gold coin, the whole of which amount said "Oregon and California Railroad Company" have assumed and agreed to pay, and to forever save, indemnify and keep harmless this company against all liability and damages by reason thereof, in consideration of this transfer and sale to said corporation, of all the property and corporate franchises of this corporation; and whereas it is the judgment of this meeting that the assumption of such indebtedness is a full, complete and adequate consideration for all the property and corporate rights and franchises of this company hereby directed to be transferred and conveyed, and that the best interests of all the stockholders herein are subserved by the cancellation of the said indebtedness." The formal part of this conveyance, so far as material, is as follows:

"Therefore, in consideration of the premises and of the assumption on the part of the "Oregon and California Railroad Company," party of the second

part herein, of all the debts and liabilities of the "Oregon Central Railroad Company," party of the first part herein, of whatsoever name or nature, and of the covenant and agreement upon the part of such "Oregon and California Railroad Company," to pay all debts, liabilities, claims, damages and demands whatsoever, of every name and nature, for which the "Oregon Central Railroad Company," party of the first part herein, is now or at any time hereafter may be made liable; and the further covenant to forever save, indemnify and hold harmless the said "Oregon Central Railroad Company," party of the first part herein, and its directors and stockholders, against all loss, damages, costs, expenses and disbursements by reason of any such claim, liabilities or demands, all which agreements and covenants are, by the acceptance of this deed of conveyance by said "Oregon and California Railroad Company," party of the second part herein, by such corporation recognized and agreed, and in and for the further consideration of the mutual covenants and agreements of the parties hereto, as aforesaid; and of the further consideration of the sum of One Dollar in hand paid by the said "Oregon and California Railroad Company," party of the second part herein, to the said "Oregon Central Railroad Company," party of the first part herein, * * * has granted, bargained, sold, aliened, assigned, transferred, set over, enfeoffed, conveyed, delivered and confirmed, and by these presents it does hereby grant, bargain, sell, alien, assign, transfer, set over, enfeoff, convey, deliver and confirm to the "Oregon and California Railroad

Company," party of the second part herein, and to its successors and assigns, all and singular, the railroad and telegraph line of the said "Oregon Central Railroad Company," party of the first part herein, now constructed from a point in the town of East Portland, in Multnomah County, State of Oregon, opposite the city of Portland, a distance of over twenty miles, running southerly to a point in Clackamas County, State of Oregon, together with all and singular the extensions of such railroad of the said party of the first part now in progress of construction north and south from the termini of the said twenty miles completed, as aforesaid, to-wit: The whole line of the said railroad and right and franchises of the said party of the first part to construct a railroad and telegraph line from Portland, in Oregon, southerly through the Willamette, Umpqua and Rogue River valleys to the southern boundary of Oregon on the California line; together with all its lands, tenements and hereditaments acquired and appropriated, whether acquired by purchase, gift, by voluntary conveyance, or the judgment or decree of any court, or which shall hereafter be acquired or appropriated for the purpose of right of way for a single or double track railroad, and all the appurtenances thereunto belonging; and also all its lands acquired, or which hereafter shall be acquired, for depots, engine houses machine shops superstructures, erections and fixtures, and also all and singular the whole of the property of every name and nature, real, personal and mixed, now owned by the party of the first part herein, or to which it has any right,

either legal or equitable, absolute or contingent; and also all and singular the franchises, rights and privileges now owned, possessed or acquired, or to which the said party of the first part has any right, title, either legal or equitable, absolute or contingent; and also all the rails, bridges, ways, piers, depots, engine houses, car houses, station houses, warehouse, machine shops, work shops, mills, machinery, engines, tackle, tools, erections, superstructures, fixtures, privileges, franchises and rights of said party of the first part, and all the lands, tenements, hereditaments and real estate wheresoever and whatsoever now owned by said party of the first part, or to which it has any right, legal or equitable, absolute or contingent, and all and singular the locomotives, passenger cars, freight cars, and all other cars, carriages, tools, machinery and equipments for said railroad, and now owned by said "Oregon Central Railroad Company," party of the first part herein; and also all goods and chattels, horses, mules, carts, drays, oxen, all live stock, and all implements of every name and nature, heretofore or now used in and about the construction of such railroad and telegraph line, and all rolling stock of every kind and description now owned by said party of the first part, together with all rents, issues, income, profits, money, rights, benefits and advantages derived or to be derived, had or received, therefrom by said party of the first part; also all donations and agreements to give, pay or transfer to the party of the first part, any moneys, lands, tenements or other property with full power and authority to enforce the collection and transfer

of the same. And also and especially all the lands, rights, title, franchise, interest, claim, property and demand whatsoever both legal and equitable, present and prospective, absolute and contingent, which the "Oregon Central Railroad Company," party of the first part herein, now has, owns or possesses, or to which it is now of right entitled legally or equitably, or to which it may at any time hereafter become entitled, in and to the franchise and grant of lands made by the Congress of the United States to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California, to Portland, in Oregon, by an Act entitled, 'An Act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California, to Portland, in Oregon,' approved July 25, A. D. One Thousand Eight Hundred and Sixty-six (1866), and amendments thereto; and also all the lands included in such grant and all the right, title and interest which the party of the first part now has to the same, hereby giving, granting and assigning unto said party of the second part all the right, title interest and claim which the party of the first part now has in or to the lands, franchises, property, benefits and emoluments granted or intended to be granted by virtue of the Act of Congress aforesaid, and the acts amendatory thereof, or supplemental thereto; also all the right, title and franchise which the party of the first part has for any purpose whatever by virtue of any act or resolution of the Legislature of the State of Oregon, or the judgment or decree of any court, either state or federal.

“TO HAVE AND TO HOLD the said premises, franchises and property, and every part thereof, unto the said “Oregon and California Railroad Company,” party of the second part herein, its successors and assigns forever.”

On April 4, 1870, the Oregon and California Railroad Company, through its Board of Directors, adopted the following resolution:

“Whereas, This company has purchased and taken an assignment from the Oregon Central Railroad Company, of Salem, Oregon, incorporated April 22, 1867, of all the railroad franchises and other property of such corporation, including all the right, title, interest and claim, both legal and equitable, absolute and contingent, of such corporation, of, in and to the lands and all other benefits granted to the Oregon Company by an Act of Congress entitled ‘An Act to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California, to Portland, in Oregon,’ approved July 25, 1866, and amendments thereto, therefore,

Resolved, That this company do accept the grant conferred by such Act of Congress, and all the benefits and emoluments therein or thereof granted, and upon the terms and conditions therein specified, and

Resolved, That the President and Secretary of this company be and they are hereby authorized and directed to file the assent of this company to such Act of Congress and amendments thereto, as aforesaid, in the office of the Secretary of the Interior, which shall be done by filing a copy of these resolutions in such office, certified to under seal of this com-

pany, and signed by the President and Secretary respectively.

Resolved Further, That a copy of the deed of assignment from said Oregon Central Railroad Company, certified to by the President and Secretary under the seal of this company, be also filed in such office of the Secretary of the Interior and accompanying these resolutions.”

A certified copy of which said resolution was on April 28, 1870, together with a certified copy of said instrument in writing of date March 29, 1870 (a copy whereof is attached to the Bill of Complaint as “Exhibit B,” which is set out in Volume I, at pages 93–125, both inclusive, Record), filed in the office of the Secretary of the Interior, and at all times since March 29, 1870, the Oregon and California Railroad Company has assumed and still assumes itself to be the successor of the East Side Company in and to all the franchises, rights and property granted or intended to be granted by the said Acts of Congress.

By the words “Oregon Central Railroad Company” in said Act of May 4, 1870, set out above, Congress intended to and did refer to the West Side Company. On July 2, 1870, the West Side Company, through its Board of Directors, assented to and accepted all of the provisions of said Act of May 4, 1870, and on July 20, 1870, filed the said assent in the office of the Secretary of the Interior.

By the issuance and negotiation or pledge of mortgage bonds, approximately \$8,000,000 was during the year 1870 procured by the Oregon and California Railroad Company, and approximately \$1,000,000

was during the year 1871 procured by the West Side Company in the same way. With the funds thus procured the work of constructing the lines of railroad contemplated by said Acts of Congress of July 25, 1866, and May 4, 1870, respectively, was prosecuted continuously until about January, 1873.

The East Side Company completed the construction of the first twenty miles of its line of railroad commencing at Portland and extending southerly therefrom, and on or about March 29th, 1870, executed the instrument in writing, a copy of which is attached to the Bill of Complaint as "Exhibit B" (which Exhibit "B" is set out in Vol. I, pp. 93-125, both inclusive, Record). With the funds procured by it in 1870, as above mentioned, the Oregon and California Railroad Company during the years 1870, 1871 and 1872 completed the construction of the East Side Railroad from the point at which the East Side Company had quit the work to a point near Roseburg, a distance of approximately 197 miles. With the funds procured by it in 1871, as above set forth, the West Side Company completed construction of the railroad contemplated by the Act of Congress of May 4, 1870, from Portland to McMinnville by way of Forest Grove, a distance of approximately 47 miles.

About January, 1873, these funds became exhausted and because thereof further construction of said railroads was at that time discontinued and was not resumed by the Oregon and California Railroad Company until about June, 1881, and was never resumed by the West Side Company.

On or about July 24th, 1874, the direction and con-

trol of the financial affairs of the said two companies were assumed, and thereafter exercised, by the creditors thereof, organized under the name of "Bondholders' Committee," which on or about February 29th, 1876, acquired all the capital stock of both companies and thereafter, and until on or about June 1st, 1881, the affairs of the two companies were conducted by and under the control of the Bondholders Committee.

On October 6th, 1880, the West Side Company executed and delivered to the Oregon and California Railroad Company the instrument in writing, a correct copy whereof is attached to the Bill of Complaint as "Exhibit C" (which is set out in Vol. I, pp. 126-133, both inclusive, Record); a certified copy of this instrument was filed with the Secretary of the Interior of the United States on or about October 20th, 1880. This instrument recites that the West Side Company under and pursuant to and by virtue of the power and authority conferred upon and vested in it by the laws of the State of Oregon, and pursuant to and by authority of resolutions duly passed at a meeting of its stockholders, and a like resolution of its Board of Directors duly passed on October 6, 1880, among other things authorized the sale and conveyance of the property described, and that in consideration of the covenants and agreements of the Oregon and California Railroad Company and the further sum of Ten Dollars paid, the West Side Company "hath granted, bargained, sold, assigned, transferred, set over, enfeoffed, conveyed and confirmed, and doth hereby grant, bargain, sell,

assign, transfer, set over, enfeoff, convey and confirm" unto the Oregon and California Railroad Company, its successors and assigns forever, "all the railroad of the said party of the first part heretofore constructed, extending from Portland, Oregon, to St. Joseph, in Yamhill County, in the State of Oregon, a distance of forty-eight miles, together with all its lands, tenements, and hereditaments acquired and appropriated for the purpose of a right-of-way for its railroad and for stations, depots, turntables and other railroad purposes, and all the appurtenances thereunto belonging.

"And also all its lands not heretofore conveyed, by it acquired and which it shall hereafter acquire or to which it is entitled under and pursuant to the provisions of the Act of Congress of the United States of America entitled 'An Act granting lands to aid in the construction of a railroad and telegraph line from Portland to Astoria and McMinnville, in the State of Oregon,' approved May fourth, One Thousand Eight Hundred and Seventy" (and other property not material to be described).

"To Have and to Hold all and singular the premises, rights, franchises and property, real, personal, and mixed, hereby conveyed or intended to be conveyed, and every part and parcel thereof, with all the appurtenances unto the same belonging, or in any wise appertaining, unto the said party of the second part, its successors and assigns forever."

The deed contains a covenant of further assurance on the part of the West Side Company, and also contains the following covenants upon the part of the

Oregon and California Railroad Company:

“And this Indenture Further Witnesseth, That the said party of the second part, the said Oregon and California Railroad Company, in consideration of the grant and conveyance aforesaid, hereby covenants and agrees to and with said party of the first part, said Oregon Central Railroad Company, its successors and assigns, that it, said Oregon and California Railroad Company, and its successors and assigns, will and shall pay and discharge, or cause to be paid and discharged, all the lawful indebtedness of the said Oregon Central Railroad Company, and will forever indemnify and save and keep harmless said Oregon Central Railroad Company, its directors and stockholders against said indebtedness and from all costs, expenses and damages on account thereof.”

At all times since October 6th, 1880, the Oregon and California Railroad Company has assumed and still assumes itself to be the successor of the West Side Company in and to all the franchises, rights and property granted or intended to be granted by the Act of Congress approved May 4, 1870.

On or about May 7th, 1881, the financial affairs of the Oregon and California Railroad Company were adjusted, substantially, as follows: All the capital stock of the company was, by action of its Board of Directors and stockholders, cancelled, and the amount of its capital stock was then established at, has ever since remained and still is of the total par value of \$19,000,000, consisting of \$12,000,000 preferred stock and \$7,000,000 common stock, and in payment of its then existing indebtedness, with ac-

crued interest thereon, all of said new capital stock was then issued, and ever since has been and still is outstanding. By the issuance thereof and use of a part of the proceeds of the new bond issue hereinafter referred to, all of the then existing indebtedness of the Company was fully paid and discharged and the several mortgages and other instruments purporting to secure same were canceled and satisfied.

On June 2nd, 1881, the Oregon and California Railroad Company executed and delivered to Henry Villard, Robert Peebles and Charles Edward Bretherton, as Trustees for the owners and holders of the preferred stock, the Trust Deed a correct copy of which is attached to the Bill of Complaint as "Exhibit D" (which is set out in Vol. I, pp. 134-165, both inclusive, Record), and which purports to convey upon the trusts therein set out, all the railroad then owned by the Oregon and California Railroad Company between East Portland and Roseburg, between Portland and Corvallis, and Albany and Lebanon, together with all other property therein described and "also all lands granted by the United States in aid of the construction of the said railroads already completed between the termini aforesaid and not yet sold, estimated to be in amount about one million nine hundred thousand acres, and all other lands now or which may be hereafter granted to said company by the United States, and which lands are intended to be more particularly identified as the same are patented by the United States in manner hereinafter provided."

This Trust Deed recites the Act of Congress of July 25th, 1866, and particularly sections 2 and 3 thereof, and the Act of May 4th, 1870, and it also recites the execution by the Oregon and California Railroad Company of a mortgage of date April 15th, 1870, to Faxon D. Atherton and Milton S. Latham of all of its railroad and all its property except the Congressional land grant, and also recites another indenture of that date executed by the Oregon and California Railroad Company, by which that Company granted and conveyed to Milton S. Latham, Faxon D. Atherton and William Norris all the lands granted and to be granted by the United States to aid in the construction of the railroad, upon the trusts as therein provided for the sale of such granted lands, and for the creation with the proceeds of such sale of a sinking fund for the payment at maturity of said issue of Ten Millions Nine Hundred and Fifty Thousand Dollars in amount of the first mortgage bonds of the Company. It also recites that default had been made in the payment of interest upon these bonds and that there had been formed an association of holders thereof, having its office and legal domicile at Frankfort-on-the-Main, in Germany, and that such association had become the holder of all of such bonds. It further recited that a plan of reorganization of the Oregon and California Railroad Company had been adopted on May 5th, 1881 and ratified May 7th, 1881, and that in pursuance of the reorganization by deed of mortgage and trust of date June 1st, 1881, the Company had mortgaged all of its railroads, lands and other prop-

erty, present and future, to Henry Villard, Horace White and Charles Edward Bretherton to secure an immediate issue of 6,000 first mortgage bonds, for the aggregate amount of Six Million Dollars.

The instrument also recites the issuance of the preferred stock of Twelve Million Dollars, and that this stock was entitled to a preferential dividend out of the net earnings of the Company, and, after the first mortgage bonds had been paid off, out of the gross proceeds of the land grants.

On or about June 28th, 1881, this Trust Deed was recorded in the office of the County Recorder of Multnomah County, Oregon, page 179, Book 27 of Record of Mortgages of that County, and thereafter, about the same time, in the office of the County Recorder of the several counties in which was situated any part of the lands granted by either of said land grants.

Thereafter such proceedings were had and action taken thereunder, with the consent of the Oregon and California Railroad Company, that Stephen T. Gage became and now is the sole surviving Trustee thereunder, and that Stephen T. Gage as such Trustee, but not individually, and the Southern Pacific Company, as the present owner of all of said preferred stock, claim and assert a lien upon the said lands under and by virtue of this Trust Deed.

By the issuance and negotiation of two separate issues of its corporate bonds, bearing date June 1st, 1881, and May 26th, 1883, respectively, (known and designated as "First Mortgage Bonds" and "Second Mortgage Bonds" respectively), the Oregon and

California Railroad Company provided approximately \$5,000,000 further construction funds; and on or about June 1st, 1881, the work of constructing the East Side railroad was resumed and thereafter continued until about January, 1884. During the last mentioned period of construction the East Side railroad was constructed and extended from Roseburg to a point about one and one-quarter miles southerly from Ashland, in the State of Oregon, a total distance of approximately 145 miles.

About January, 1884, the last-mentioned construction funds became exhausted and the work of further construction was discontinued until about April, 1887, when it was resumed.

About January 19th, 1885, the said First Mortgage Bonds and Second Mortgage Bonds being still outstanding, in a suit theretofore brought and then pending in the United States Circuit Court for the District of Oregon, wherein certain of the holders of said First Mortgage Bonds were plaintiffs, and the Oregon and California Railroad Company and others were defendants, the railroads and all other property of the Company were placed in the hands of a receiver then and in that suit appointed for that purpose.

On May 12, 1887, the status of said land grants was as follows: Under the East Side grant, during the years 1871 to 1877 inclusive, patents for 323,078.68 acres of land, (being lands contiguous to the first 125 miles of the said East Side railroad), were applied for by and issued to the Oregon and California Railroad Company. Excepting as aforesaid, no patents

under the East Side grant were issued until the year 1893, and no patents under the West Side grant were issued prior to the year 1895. The total length of the East Side railroad is approximately 367 miles. With the exception of the northerly 197 miles thereof, no part of the East Side railroad was constructed within the time prescribed therefor; and on May 12, 1887, the portion of the East Side railroad extending from Ashland to the southerly boundary line of the State of Oregon remained unconstructed. That part of the West Side railroad extending from Forest Grove to Astoria was never constructed, and because thereof the granted lands of the West Side grant contiguous to such unconstructed railroad were, by act of Congress, approved January 31, 1885, (23 Stat. 296), entitled "An Act to declare forfeiture of certain lands granted to aid in the construction of a railroad in Oregon," declared forfeited to and the ownership thereof resumed by the United States. Of the aforesaid granted lands, 163,430.28 acres were sold by the Oregon and California Railroad Company prior to May 12, 1887. Nearly all of the said sold lands were so sold to actual settlers, in small quantities, although in a few instances such sales were made in quantities exceeding 160 acres to one person, and for prices slightly in excess of \$2.50 per acre.

The Southern Pacific Company was incorporated by an Act of the General Assembly of the State of Kentucky, entitled "An Act to incorporate the Southern Pacific Company," approved March 17, 1884; which Act was amended by an act of the Gen-

eral Assembly of the State of Kentucky, approved March 21, 1888, entitled "An Act to amend 'An Act to incorporate the Southern Pacific Company,' approved March 17th, 1884." A correct copy of said Act of March 17, 1884, and amendatory act of March 21, 1888, is "Exhibit No. 4 to Stipulation" (Vol. IV, pp. 1633-1639, Record).

Articles of Association, Amalgamation and Consolidation of the Central Pacific Railroad Company of California and the Western Pacific Railroad Company, were filed in the office of the Secretary of State of the State of California on June 23, 1870, amalgamating and consolidating the said companies into the Central Pacific Railroad Company, incorporated as such by the said articles—a correct copy of which is marked "Exhibit No. 5 to Stipulation" (Vol. IV., pp. 1640-1651, Record). Articles of Amalgamation and Consolidation between the Central Pacific Railroad Company, the California and Oregon Railroad Company, and the other Railroad Companies therein named, were filed in the office of the Secretary of State of the State of California August 22, 1870, a copy of which is "Exhibit No. 6 to Stipulation" (Vol. IV., pp. 1652-1662, Record).

On August 22, 1870, the Central Pacific Railroad Company was the owner of all unsold lands west of a point near Ogden, in Utah, coterminous with the Central Pacific Railroad from Ogden by way of Elko and Reno, in Nevada, Colfax, Auburn, Sacramento, Stockton, Miles and San Jose to San Francisco, in California, granted by Act of Congress approved July 1, 1862, entitled "An Act to aid in the construc-

tion of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military and other purposes" (12 Stat. 489), as enlarged by the amendatory Act of Congress approved July 2, 1864, entitled "An Act to amend an Act entitled 'An Act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military and other purposes,' approved July first, eighteen hundred and sixty-two" (13 Stat. 356). At the time the said Articles of Amalgamation and Consolidation were filed on August 22, 1870, the said California and Oregon Railroad Company was the owner of all unsold lands in California granted by the Act of Congress approved July 25, 1866 (14 Stat. 239), entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California, to Portland, in Oregon." From August 22, 1870, the date of filing the last mentioned Articles of Amalgamation and Consolidation, until July 29, 1899, the Central Pacific Railroad Company remained the owner of all lands of the three several land grants just mentioned which were unsold at the date of filing these articles, and were not thereafter, from time to time (prior to July 29, 1899) sold by the said Central Pacific Railroad Company. On July 29, 1899, the Central Pacific Railroad Company granted and conveyed unto the Central Pacific Railway Company all lands of the said land grants remaining unsold on July 29, 1899—a copy of which

conveyance is "Exhibit No. 7 to Stipulation" (Vol. IV., pp. 1663-1678, Record). The statements concerning the ownership and conveyance of the lands granted by said Acts of Congress are made subject to the terms and provisions of said Acts of Congress respectively, and all rights of the United States thereunder—the title to said lands not being an issue in this suit. A correct copy of the Articles of Association and Articles of Incorporation of the Central Pacific Railway Company referred to, is "Exhibit No. 8 to Stipulation" (Vol. IV., pp. 1678-1688, Record).

On February 17, 1885, the Central Pacific Railroad Company leased its railroad from Ogden to San Francisco and branch thereof from Roseville Junction to Delta, together with certain other railroads and property connected therewith as described in the instrument in writing of that date to the Southern Pacific Company; and pursuant thereto the Southern Pacific Company has held possession of the railroads and other property therein described, and operated the said railroads, as such lessee, continuously since the date of the said Agreement, and still continues to so operate the same—which Agreement is "Exhibit No. 2" to the amended Joint and Several Answer of the defendants Oregon and California Railroad Company, Southern Pacific Company and Stephen T. Gage, as follows:

"Exhibit No. 2.

This agreement, made and entered into this seventeenth (17) day of February, 1885, between the Southern Pacific Company, a corporation duly or-

ganized and existing under the laws of the State of Kentucky, and now doing business in the State of California, and the Central Pacific Railroad Company, a corporation duly formed and existing under the laws of the State of California and the United States, witnesseth:

That, Whereas part of the through business heretofore done by the Central Pacific Railroad Company's line from Ogden to the waters of the Pacific has been diverted by the Northern Pacific, Atlantic and Pacific, and Atchison, Topeka and Santa Fe railroads:

And, whereas the Union Pacific Railroad Company has secured the control of the road known as the Oregon Short Line, and thereby secured an outlet to the Pacific, other than over the Central Pacific Railroad, and thus in that respect placed itself in opposition to the interests of the Central Pacific;

And, Whereas it now appears that the through business, hitherto done by the Central Pacific Railroad, will thereby be further diverted; and that it is not only to the best interests of, but absolutely necessary that the Central Pacific Railroad Company, in order to maintain itself against these diversions, should be operated in connection with a friendly through line to the waters of the Atlantic;

And, whereas the said Southern Pacific Company has a line of railroad under its control, for a period of ninety-nine years extending continuously from the Pacific Ocean to the Atlantic Ocean;

And, Whereas the lines of each company are doing a large local traffic, and it is important to both that

the same should be conducted in harmony ;

And, Whereas the said Southern Pacific Company is willing to enter into an agreement with the Central Pacific Railroad Company where its line and the line of the said Southern Pacific Company shall be operated so as to secure their just rights to each without the one gaining any benefit or advantage at the expense of the other, and whereby the Central Pacific Railroad Company may for a long term of years be assured of protection against the diversion of its traffic and be relieved of the disadvantages flowing from lack of harmonious connections ;

And, Whereas by reason of the facts before recited it is mutually advantageous to the Southern Pacific Company and the Central Pacific Railroad Company to make such agreement ;

And, Whereas both companies contract in the knowledge that the future development of the country may change materially the relations of the companies to each other in respect to railroad traffic, and may in the future render any agreement now made, however fair in its terms in view of existing conditions, advantageous to one at the expense of the other, and thereby defeat the purposes which said companies desire and intend to accomplish by making this agreement ;

And, Whereas it is intended that such shall never be the effect of this agreement, therefore all the premises and covenants herein shall be construed in the light of the conditions now existing, and the arbitrators hereinafter named, in adjusting the terms and provisions of this agreement to a changed state

of affairs, if such change should ever take place, must keep in view the main purpose of the parties to this agreement, to-wit, that it is for the mutual advantage of both parties, and that neither is to be benefited at the expense of the other;

Now, Therefore, to accomplish the purposes aforesaid, in consideration of the premises and of the mutual promises herein, the said Central Pacific Railroad Company hereby leases to the said Southern Pacific Company for the term of ninety-nine years, from the first day of April, A. D. 1885, the whole of its railroad situated in the Territory of Utah and States of Nevada and California, and known and designated as the Central Pacific Railroad, together with all the branches thereof, together with all the rolling stock, telegraph lines, steamboats, wharves, piers, depots, workshops, and all other property, real and personal, now owned, held and possessed by the said Central Pacific Railroad Company and used upon, or in connection with, said railroad and telegraph lines, together with all the appurtenances thereunto belonging, with the right to possess, maintain, use, operate and enjoy the said property, and to receive the rents, issues and profits thereof.

And the said Central Pacific Railroad Company hereby assigns to the said Southern Pacific Company all the leases which it now holds of railroads and other property situated in said State of California, and lying and being north of the town of Goshen, in the County of Tulare, with the right to take, hold, operate, maintain and enjoy said railroads and other

property in the same manner as the said Central Pacific Railroad Company holds, operates, enjoys, and maintains the same under the said leases, and with the right to receive the rents, issues and profits thereof.

And the said Central Pacific Railroad Company hereby releases the Southern Pacific Railroad Company, a corporation formed and existing under the laws of the United States and of the State of California, and the Southern Pacific Railroad Company, a corporation formed and existing under the laws of the Territory of Arizona, and the Southern Pacific Railroad Company, a corporation formed and existing under the laws of the Territory of New Mexico, and each of them, from all and every obligation under or by virtue of any and every lease made by said three last-mentioned railroad companies, or either of them, to the said Central Pacific Railroad Company, and transfers and surrenders unto the said Southern Pacific Company, the possession of all the property in said leases, or any of them mentioned or described, with the right to receive the rents, issues and profits thereof free from all claim of the said Central Pacific Railroad Company to the same or any part thereof.

The said Southern Pacific Company agrees to and with the said Central Pacific Railroad Company that it will keep and maintain the property hereby leased in good order, condition, and repair; operate, maintain, add to, and better the same, at its own expense; pay all taxes legally assessed against or levied thereon, and will at the termination of this lease

return the same to the said Central Pacific Railroad Company, or to its successors or assigns (with additions and betterments) in as good condition and repair as the same was at the date hereof.

And the said Southern Pacific Company hereby agrees to and with the said Central Pacific Railroad Company that it hereby assumes and will discharge all the liabilities and obligations of every kind (including its obligations on leases now held by it) of the said railroad company, except the obligation to pay the principal of said railroad company's indebtedness known as its "floating debt," and accept the obligation to pay the principal of the indebtedness of said railroad company known as its "bonded indebtedness," now outstanding and secured by mortgage or deed of trust, or which may be hereafter incurred under the provisions of any existing mortgage or deed of trust, or of any mortgage or deed of trust, hereafter made with the consent of the Southern Pacific Company; and except the principal of all indebtedness the payment of which has heretofore been guaranteed by the Central Pacific Railroad Company; and except the principal of the indebtedness of the said Central Pacific Railroad Company evidenced by bonds of the United States heretofore by the Government thereof loaned to the said Central Pacific Railroad Company. That as to such excepted indebtedness the said Southern Pacific Company will pay off and discharge at maturity the interest upon the same, except the interest upon the bonds of the United States loaned as aforesaid; and that, as to such bonds and the interest thereon, the said South-

ern Pacific Company will discharge the annual obligations imposed upon said Central Pacific Railroad Company by existing acts of Congress, and will during the continuance of this agreement, fully comply with the terms of, perform all the duties prescribed in, and discharge all the obligations imposed upon said Central Pacific Railroad Company by the act of Congress commonly known as the "Thurman Act."

And the said Southern Pacific Company hereby agrees to and with the said Central Pacific Railroad Company that it will well and truly perform all the duties and obligations of said railroad company to the United States and the Government thereof under existing acts of Congress relating to the maintenance and operation of its railroad, and to transportation for said Government over the same, as fully and faithfully as said railroad company is bound to do, except as otherwise hereinbefore provided.

And the said Southern Pacific Company agrees to and with the said Central Pacific Railroad Company that it will keep true and faithful accounts of all the earnings of the said Central Pacific Railroad, including the earnings of the railroads now held by said Central Pacific Railroad Company under leases and situated north of Goshen, together with true and faithful accounts of all expenditures, payments and disbursements of every kind made by the said Southern Pacific Company in operating, maintaining, adding to, and bettering the same, and of all expenditures, payments, and disbursements made by the said Southern Pacific Company for taxes, rentals,

interest, or in discharge of obligations incurred by said Southern Pacific Company under the provisions of this agreement hereinbefore contained; Provided, however, that any payments made by the said Southern Pacific Company to either of the said Southern Pacific railroads hereinbefore mentioned for rentals under the terms of existing leases in favor of the said Central Pacific Railroad Company, and now assigned to the Southern Pacific Company, shall never be included in or made part of any charge against the said Central Pacific Railroad Company or the earnings of its said railroads.

And the said Southern Pacific Company hereby agrees with the said Central Pacific Railroad Company that during the continuance of this lease it will annually, on the first Monday in May, pay to the said Central Pacific Railroad Company, as guaranteed rental for said Central Pacific Railroad and other leased property for the year ending on the thirty-first day of December next preceding that date, the sum of one million two hundred thousand dollars (\$1,200,000).

And the said Southern Pacific Company hereby further in this behalf agrees with the said Central Pacific Railroad Company that if the earnings of the said Central Pacific Railroad, and of the railroads situated north of Goshen now held by the said Central Pacific Railroad Company, under leases, shall in any year during the continuance of this agreement exceed all expenditures, payments, and disbursements of every kind made by the said Southern Pacific Company for such year, in operating,

maintaining, adding to, and bettering the same, and of all expenditures, payments, and disbursements made by the said Southern Pacific Company for taxes, rentals, interest, and in discharge of any of the obligations by said Southern Pacific Company incurred under this agreement, as heretofore provided, including the said sum of one million two hundred thousand dollars, then such excess for any such year not exceeding the sum of two million four hundred thousand dollars shall, on the first Monday in May, as aforesaid, be paid to the said Central Pacific Railroad Company as additional rental for such year.

And it is further agreed between said Southern Pacific Company and the said Central Pacific Railroad Company that if at any time it appears that by the operation of this agreement either party is being benefited at the expense of the other, then this agreement shall be revised and changed, so that such will not be the operation thereof, and if the parties hereto cannot agree upon the changes necessary to that end, then each party shall appoint one arbitrator, disinterested, but skilled in relation to the subject matter, and the award and decision of such arbitrators, in writing, shall be binding upon the parties hereto, and this agreement shall be revised and changed in accordance with such award and decision, and, as revised and changed, shall be duly executed in writing by the parties hereto.

And it is further agreed that if the arbitrators so chosen cannot agree upon an award and decision, then that the two shall choose a third impartial and skilled arbitrator, and that the award or decision of

two of said three arbitrators shall have the same force and effect between the parties hereto, and shall be executed in like manner as hereinbefore provided for the award and decision of the two arbitrators first chosen.

And it is further agreed between the said Southern Pacific Company and the said Central Pacific Railroad Company that if any legislation or governmental action hereafter be had which, in the opinion of the said Southern Pacific Company, is in hostility to the said Central Pacific Railroad Company, its rights, or the property hereby leased, the said Southern Pacific Company may, on notice to the said Central Pacific Railroad Company, terminate this agreement, or may submit to arbitrators, in the manner and with the effect hereinbefore provided for, changes and revisions.

And it is further agreed between the Southern Pacific Company and the Central Pacific Railroad Company that, upon the execution of this agreement, the said Southern Pacific Company may enter upon, take possession of, and hold during the continuance of this agreement all the property, real and personal, hereby leased by the said Central Pacific Railroad Company to the said Southern Pacific Company, and that duplicate lists of all the rolling stock and other personal and movable property so leased, showing its condition at the time of the execution of this agreement, shall be made and certified by the secretary of each of said companies, and that one of said lists shall be kept by each of said companies.

And it is further agreed between the Southern

Pacific Company and the Central Pacific Railroad Company that if at any time any of the rolling stock or other personal property hereby leased to the said Southern Pacific Company by said Central Pacific Railroad Company be used upon any roads other than the Central Pacific Railroad or the leased road north of Goshen, then the said Southern Pacific Company shall credit to the said Central Pacific Railroad Company the usual and customary sums paid by one railroad company to another for the use of the like property, and that the amounts so credited shall be deemed and taken to be a part of the earnings of said Central Pacific Railroad Company.

And it is further agreed that if, in the operation of said Central Pacific Railroad and leased roads north of Goshen, it becomes necessary to use any of the rolling stock or other personal property of the Southern Pacific Company, not leased from the Central Pacific Railroad Company, upon the said Central Pacific Railroad or leased roads north of Goshen, that the usual and customary sums paid by one railroad company to another for the use of like property, shall be allowed as, and constitute a charge against the receipts of the said Central Pacific Railroad and said leased lines, and be so considered in the accounting hereinbefore provided for.

In Testimony Whereof, the said Southern Pacific Company and the said Central Pacific Railroad Company have caused these presents to be signed by their respective presidents, countersigned by their secretaries, and their corporate seals to be hereunto affixed, pursuant to orders of their respective boards

of directors, the day and year first herein written.

In duplicate.

(S. P. Co. Corporate Seal.)

W. E. BROWN,

President Southern Pacific Co.

H. C. NASH.

Secretary Southern Pacific Co.

LELAND STANFORD,

President Central Pacific Railroad Co.

(C. P. R. R. Co. Corporate Seal.)

E. H. MILLER, Jr.,

Secretary Central Pacific Railroad Co."

(Vol. II., pp. 957-967, Record.)

On July 1, 1887, the Oregon and California Railroad Company leased all its railroads in Oregon (including its East Side railroad and its West Side railroad) and other property used in connection therewith as described in the said agreement, to the Southern Pacific Company, pursuant to which the Southern Pacific Company held possession of and operated said railroads and property as such lessee, continuously from June 6, 1888, until August 1, 1893,—which instrument is "Exhibit "F" to the Bill of Complaint (Vol. I., pp. 185-188, Record). This instrument does not include any of the lands involved in suit, and does not affect any property other than the railroad with all its branches, together with rolling stock, telegraph lines, tools, and property of every kind and nature whatsoever, in use upon or in connection with the said railroad.

On January 1, 1888, the Central Pacific Railroad Company leased its said railroad from Delta to the

north boundary line of the State of California, to the Southern Pacific Company; pursuant to which agreement the said Southern Pacific Company has operated said railroad as such lessee, continuously since the date thereof, and still continues to so operate the same, a copy of which instrument is "Exhibit No. 3" to said Joint and Several amended Answer. (Vol. II., pp. 968-970, Record.)

On August 1, 1893, the Oregon and California Railroad Company, by a new lease, leased all its railroads in Oregon (including the East Side railroad and West Side railroad) and other property used in connection therewith, described in said lease of July 1, 1887, to Southern Pacific Company; pursuant to which, said last named company has held possession of and operated the said railroads continuously from August 1, 1893, inclusive, to the present time, and still continues to so hold possession of and operate the same, which lease is "Exhibit G" to the Bill of Complaint (Vol. I., pp. 189-196, Record).

On or about December, 1867, the principal stockholders of the Central Pacific Railroad Company of California became the principal stockholders of the California and Oregon Railroad Company; and on or about August 1, 1899, the Southern Pacific Company became, has ever since remained, and still is, the principal stockholder of the Central Pacific Railroad Company; and on or about August 1, 1899, the Southern Pacific Company became, has ever since remained, and still is, the principal stockholder of the Central Pacific Railway Company; and on or about April 9, 1901, the Southern Pacific Company

became, has ever since remained, and still, is the principal stockholder of the Oregon and California Railroad Company.

On July 31, 1885, the Oregon and California Railroad Company and the Central Pacific Railroad Company entered into an agreement in writing, a copy of which is "Exhibit No. 9 to Stipulation," as follows:

"This Agreement, made and entered into this thirty-first day of July, 1885, by and between the Oregon and California Railroad Company, of Oregon, hereinafter called the Selling Company of the one part, and the Central Pacific Railroad Company, of California, hereinafter called the Purchasing Company, of the other part,

Witnesseth, as follows:

First: The Selling Company hereby agrees to sell and transfer to the appointee of the Purchasing Company all its railway lines (the constructed portion of which lines extend from East Portland to a point about one and a half miles south of Ashland, and from Portland to Corvallis, and from Albany to Lebanon, and are about 451 miles in length) and the appurtenances and all its rolling stock, supplies and equipment, its lands remaining unsold at the date of this agreement, and its rights and interests in lands, and rights to acquire and earn lands, and all its rights, grants and franchises granted by the United States and also all its interests of every description in the Northern Pacific Terminal Company, at a price and upon the terms hereinafter specified.

Second: The transfer of the property sold shall be made as soon as possible, and in any case not later

than the first day of July, 1886, and in such manner as to give a good and clear title to the property sold to the appointee of the Purchasing Company, either by means of a sale under foreclosure of the deed of first mortgage of the Selling Company, or by such other means as the counsel of the Purchasing Company may approve.

Third: The property sold shall, when so transferred, be free from all debts, liabilities and encumbrances of every description, except such liabilities and duties as may be incident to the land grant and franchises granted by the United States to the Selling Company and agreed to be transferred to the appointee of the Purchasing Company and except any and all such liabilities for arrears of rent or otherwise, as may be incident to the interest of the Selling Company in the Northern Pacific Terminal Company. The value of the supplies transferred shall not be less than the value of those on hand at the date hereof and the Selling Company shall keep up the property to its present state of repairs until the transfer takes place. The whole amount of land sold at the date hereof does not exceed in aggregate 300,000 acres.

Fourth: For the purpose of adjusting the accounts and operating expenses, and dividing the earnings on the transfer of the property, an account shall be stated between the Purchasing and Selling companies as of the first day of July next; and all earnings of the railroads and other property sold, received after that date and the net proceeds and rentals of or from all lands sold or leased after the date hereof

shall go to the credit of the Purchasing Company or its appointee which shall undertake all expenses appertaining to the operation of the road as from the first day of July, 1886, and shall from such last mentioned date pay interest on the bonds to be issued in payment for the property purchased as hereinafter specified and shall pay or account for the dividends becoming due after said first day of July, 1886, on the shares in the Purchasing Company, to form part of the price as hereinafter mentioned. All net earnings of the existing railroads previous to the first day of July next, and the net price of all lands sold previous to the date hereof, shall belong to the Selling Company and no charge shall be made by the Purchasing Company or its appointee for receiving and paying over such amounts. The carriage of construction, labor and material over the existing lines shall be done at cost and without profit to the Selling Company, the certificate of the Chief Accounting Officer of the Central Pacific Railroad Company as to the amount of such cost being agreed to be final between the parties.

Fifth: The price of the property sold shall be \$8,000,000 par value of the shares of the Purchasing Company, and carrying all dividends declared after July 1st, 1886, and \$10,500,000 par value of bonds made or guaranteed by the Purchasing Company, to be secured on the property purchased as next hereinafter described, and carrying interest from July 1, 1886.

Sixth: The bonds to be issued or guaranteed by the Purchasing Company and delivered in payment as

last mentioned, shall be payable principal and interest in gold, forty years after date and bear interest from the first day of July next, at the rate of three per cent per annum for two years, and five per cent per annum thereafter, payable half yearly. Such bonds shall be either issued by or unconditionally guaranteed by, the Purchasing Company, as the Purchasing Company may decide, and shall be secured by a mortgage (to be made to the Farmers' Loan and Trust Company in case such Trust Company shall perform the duties of trustee at not exceeding fifty cents per bond, otherwise the Union Trust Company, or such company as shall be agreed upon by the parties) of all the property purchased hereunder, and of all extensions and of the future acquired property of the Purchasing Company in Oregon; and the deed of Mortgage shall be similar—except so far as otherwise stated in this agreement—to the existing deed of trust mortgage of the Selling Company. The net proceeds of the lands transferred and included in this mortgage shall form a sinking fund for the redemption of the bonds at par. The amount of the bonds to be issued under the mortgage shall be as follows: \$30,000 per mile for every mile of standard gauge road, now or hereafter constructed or acquired and comprised in the mortgage and \$10,000 for every mile of narrow gauge road now or at any time hereafter constructed or acquired and comprised in the mortgage. The mortgage deed shall provide for the issue and delivery to the Selling Company, upon the above mentioned transfer of the property to the ap-

pointee of the Purchasing Company, of the \$10,500,000 of bonds above specified and that the trustee of the mortgage shall further issue to the Purchasing Company or its appointee, for each mile of road constructed between Ashland and the California state line, \$100,000 for such bonds, and for each ten miles of steel rails laid down on the present lines of the Selling Company and not now laid with steel rails, \$50,000 of such bonds.

On the completion of the rail connection between the present lines of the Selling Company and the line of railway of the Purchasing Company any unissued bonds for which the mileage shall then be constructed, shall be transferred by the trustee to the Purchasing Company, or its appointee; Provided, however, that such aggregate issue to the Purchasing Company or its appointee shall not exceed, including the \$10,500,000 to be issued to the Selling Company, the limit of \$30,000 for each constructed mile. For any additional mileage constructed or acquired, either between Junction and Corvallis, or elsewhere in Oregon, the Purchasing Company, or its appointee, shall be entitled to receive from the Mortgage Trustee, the sum of \$30,000 for each mile of standard gauge road and the sum of \$10,000 for each mile of narrow gauge road. The Mortgage Trustee, however, not to be compelled to accept less than ten miles of road at one time, except in cases of terminal sections. Deliveries of bonds under such mortgage are to be made by the Trustee from time to time upon presentation to it of affidavits of the President and Chief Engineer of the Purchasing Company, or its appointee, to the facts authorizing delivery of such bonds under this article,

and without other evidence and proof thereof.

Seventh: Notwithstanding the provisions to be inserted in the mortgage deed restricting the future issue of bonds to a mileage rate as above specified, the mortgage deed, shall permit the Purchasing Company, or its appointee, to require the Trustee at one time, or from time to time, to issue and permit the sale of such amount or amounts of bonds as the Purchasing Company, or its appointee, may think fit; Provided, However, that the proceeds of such bonds shall be received by the Mortgage Trustee, and not by the Purchasing Company, or its appointee, and shall be disbursed by the Mortgage Trustee to the Purchasing Company, or its appointee only pro rata as and when the Purchasing Company, or its appointee, would have been entitled to receive such bonds thereunder under the foregoing articles hereof.

Eighth: The present holders of the First Mortgage Bonds of the Selling Company shall have the option, for 21 days after notice to that effect shall have been published in one daily paper in London and Frankfort respectively, of subscribing, in the ratio of one new bond for every three old bonds now held by them, respectively, to the new bonds to be issued in the manner above stated, at the price of eighty-six per cent of their par value, payable one-fifth on subscription and the residue in equal parts at the expiration of three, six, nine and twelve months from the date of such subscription.

Ninth: The Purchasing Company, or its appointee shall, within three years from the transfer of the property as above prescribed, complete the

railway between the present southern terminus of the railway lines of the Selling Company, at or near Ashland, in Oregon, and the present northern terminus of the Oregon division of the railway lines of the Purchasing Company, at or near Delta, so as to form a through line between Portland in Oregon, and San Francisco in California.

Tenth: The 80,000 shares of the capital stock of the Purchasing Company of the nominal value of \$8,000,000 above mentioned, shall be delivered to the Selling Company upon the transfer of the property as above prescribed, and shall, in the first instance, be registered for the purpose of delivery in the joint names of George Henry Hopkinson, the President of the Selling Company, or of such other person as may be the President of the Selling Company, and C. E. Bretherton, Vice President of the Selling Company, or of such other person as may be the Vice President of such Company. But such shares shall carry dividends only from the 1st day of July, 1886, as above stipulated.

Eleventh: This agreement shall be void unless the stockholders of the Oregon and California Railroad Company shall, within two months from this date, ratify this agreement, and the two committees now formed respectively in London and Frankfort and representing the First Mortgage Bondholders of this Company, shall, within the same time, execute in due form a confirmation and acceptance of this agreement.

Twelfth: The Selling Company binds itself to execute to the Purchasing Company or its appointee,

on or before the first day of July, 1886, a proper deed transferring the property hereby agreed to be sold, free from all debts, liabilities and encumbrances, except as above specified, and to transfer the possession thereof and in case it shall fail to do so, the Purchasing Company may, at its option, declare this agreement to be void.

Thirteenth: No personal liability of any description shall attach to the officers of the two contracting companies, who execute this agreement on their respective behalf.

In Witness Whereof, the parties hereto have, by their respective Vice Presidents, thereunto duly authorized, executed these presents the thirty-first day of July, 1885.

THE OREGON AND CALIFORNIA RAIL-
ROAD COMPANY,

By C. E. BRETHERTON,

Vice President.

THE CENTRAL PACIFIC RAILROAD
COMPANY,

By C. P. HUNTINGTON,

Vice President."

(Vol. IV., pp. 1689-1696, Record.)

On or about October 11, 1886, the Central Pacific Railroad Company, the Pacific Improvement Company (a corporation organized in 1878 under the laws of the State of California) and the Southern Pacific Company entered into an agreement in writing, a copy of which is "Exhibit No. 1" to the Joint and Several Answer of the Oregon and California Railroad Company, Southern Pacific Company, and Stephen T.

Gage, individually and as trustee, and which is as follows:

“This Agreement, made and entered into on the eleventh day of October, 1886, between the Central Pacific Railroad Company, party of the first part, the Pacific Improvement Company, party of the second part, and the Southern Pacific Company, party of the third part, Witnesseth:

That Whereas: The Central Pacific Railroad Company is the successor in interest of the California and Oregon Railroad Company, mentioned in the act of Congress of July 25, 1866, entitled “An Act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad, in California, to Portland, in Oregon”; and

Whereas, the said Central Pacific Railroad Company has constructed a portion of the line contemplated by said Act of Congress, to-wit, that portion between Roseville Junction on the Central Pacific Railroad, and the town of Delta; and

Whereas, about one hundred and four miles of the line between Roseville Junction and the southern boundary line of Oregon, as contemplated in said Act of Congress, has not been constructed; and

Whereas, the Oregon and California Railroad Company, charged by said Act of Congress with the construction of that portion of the said line of railroad between Portland, in Oregon, and the northern boundary line of California, has been in an embarrassed condition, and has been unable to complete its road to said boundary line; and

Whereas, until the whole of said line is completed

making a through connection between Portland, in Oregon, and the City of San Francisco, in California, no part of said line can be advantageously or profitably operated, nor the Act of Congress in relation thereto be carried into effect according to the spirit and intent thereof, to-wit, the construction and maintenance of a continuous railroad between the said cities, which the Government of the United States may use for the transportation of its property, troops and munitions of war when necessary, and to aid in the construction of which has granted quantities of the public lands; and

Whereas, the completion by the said Central Pacific Railroad Company of its own road to the southern boundary line of Oregon without assurance of the completion of that portion of the road from Portland to said boundary line would be a waste of money, the road having to be constructed through a rugged and mountainous country at great expense and without sustaining local traffic; and

Whereas, it is of the greatest importance to the Central Pacific Railroad Company that it should have an opening into Oregon both for local traffic and the through business of the two cities and also to furnish business for its entire line from Ogden. Now, therefore, for the purpose of completing its said road, and of securing the completion of the road between the California state line and Portland, Oregon, thus making a through line between said Cities of Portland and San Francisco, and a connection with the Union Pacific Railroad at Ogden, and in order to secure the business of the northern portion of the State of Cali-

fornia and as much as possible of the business of the State of Oregon and to bring such business to its line from Ogden, and for the purpose and with the intent of carrying into effect the provisions of said Act of Congress, the said Central Pacific Railroad Company, hereby covenants and agrees with the said Pacific Improvement Company;

First: That the said Pacific Improvement Company shall in a good workmanlike manner construct, finish, furnish and complete the railroad and telegraph line of the said Central Pacific Railroad Company, commencing at a point near the said town of Delta and running thence in a general northerly direction by the most practicable route to a point on the southern boundary line of Oregon, there to connect with the road of the said Oregon and California Company a distance of one hundred and four miles, as near as may be, together with the rolling stock, buildings, instruments and fixtures thereof; that is to say, to construct, finish and complete all the clearing, grading excavations, embankments, ditches, drains, masonry, culverts, bridges, trestling and necessary fencing, and furnish all the ties, timber, rails, all the chairs, fish-plates, spikes, frogs and switches, lay and complete all the main line of track and all side tracks, spur tracks and turnout necessary, usual and proper for a single track railroad; also all necessary and proper buildings and erections for stations, freight and passenger depots, water-tanks, turn-tables, engine houses, section houses, work and repair shops, with all the tools, furniture and implements necessary and proper therefor, also

to furnish and place on said railroad all necessary and proper rolling stock, instruments and equipments, including locomotives, passenger, box, freight, baggage, platform, dump and hand cars, for the proper and successful working and repairing of said railroad and telegraph line, said rolling stock to be furnished and delivered, as the same may be required by the said Central Pacific Railroad Company not to exceed the following quantity and proportion, namely: one locomotive for every eight miles of road constructed under the contract; one passenger car for every five miles of road, three box and flat cars for every mile of road; the proportion of each to be determined by the said Central Pacific Railroad Company; one hand car for every six miles of road; such number of dump cars as may be required for maintaining the line, said railroad to be constructed and complete to a point at or near Klamath River within twelve months from the date hereof, and to the southern boundary line of Oregon as soon as the said Oregon and California Railroad is completed to said line.

Second: That the said Pacific Improvement Company shall furnish and pay for all the engineer service necessary or requisite for the location and construction of said railroad and its appurtenances, such location and construction to be subject to the approval of the President or Chief Engineer of said Central Pacific Railroad Company, who may direct such changes to be made as they may deem proper; but the salary of the Chief Engineer shall be paid by the said Central Pacific Railroad Company.

Third: That the said Pacific Improvement Company will pay all the costs, damages and other expenses incurred in obtaining right of way for the construction of said road and to that end the Central Pacific Railroad Company agrees that it may use the name of the said Company in any legal steps found necessary to be taken in securing such right of way.

Fourth: That the said Pacific Improvement Company will within a reasonable time and as soon as it can be done to the best advantage, purchase, obtain possession and control of the said Oregon and California Railroad, or, that it will within a reasonable time purchase the whole of, or a majority of the shares of the capital stock of said Oregon and California Railroad Company, and in either event will within a reasonable time complete or cause to be completed, the said Oregon and California Railroad, to a connection with the Central Pacific Railroad at a point on the boundary line between California and Oregon, and as the case may be will enter into or will cause the said Oregon and California Railroad Company to enter into a contract perpetual with the said Central Pacific Railroad Company, its successors or assigns, that the said Oregon and California Railroad shall be operated in harmony with the said Central Pacific Railroad, prorating for services and covenanting therein never to give to any other railroad company any better terms for through traffic and for the interchange of business than it gives to the Central Pacific Railroad Company, its successors or assigns.

Fifth: That the said Pacific Improvement Company shall and will repay to the said Central Pacific Railroad Company within one hundred and twenty days from the date hereof all sums of money with interest thereon, at the rate of 6 per cent per annum, heretofore by the said railroad company expended upon that portion of its aforesaid line of railroad and telegraph line lying north of Delta, and that if said railroad company has not fully paid all the costs and expenses incurred as aforesaid, the said improvement company will assume the whole thereof and will upon demand pay off and discharge the same, or that if the said railroad company is compelled to pay the same or any part thereof the said Improvement Company will within one hundred and twenty days after notice thereof, repay to the said railroad company the full amount of any such payment or payments, with interest at the rate aforesaid; and

The said Southern Pacific Company, lessee of the said Central Pacific Railroad Company, hereby covenants and agrees with the other parties to this contract that in consideration of the advantages to be derived by it from the bringing of business to the main lines of the Central Pacific Railroad, it will, when said through line is completed, finished and ready for operation, enter into an agreement in writing with the said Central Pacific Railroad Company whereby it shall lease from said Company that portion of said line between Roseville Junction and the state line not now included within its lease, and will increase the consideration of twelve hundred thou-

sand dollars, guaranteed rental mentioned in the existing lease as much in proportion as eighty thousand shares of the capital stock of said Central Pacific road shall bear to the whole amount of capital of said company now issued, and will also increase the limit of the maximum rental of thirty-six hundred thousand dollars therein provided for in like proportion, and that it will transport and convey free of charge over the line operated by it in California north of San Francisco all agents, laborers and employes and all provisions, tools, iron and other materials and all other property employed or used, or to be employed or used in and about the construction of said railroad and telegraph line, and their appurtenances by or for said Pacific Improvement Company; and

The said Central Pacific Railroad Company hereby covenants and agrees to and with the said Pacific Improvement Company that in consideration of the premises and of the faithful performance of the covenants herein contained to be kept, observed and performed by said Pacific Improvement Company, it will upon the execution of this agreement issue and deliver to said company eighty thousand shares of its capital stock and in addition thereto it will pay to said Pacific Improvement Company four million five hundred thousand dollars, in mortgage bonds as follows: When one-half of the work on said road between Delta and the Oregon line is completed, it will pay and deliver to said Pacific Improvement Company all of its first mortgage bonds now unissued part of an issue by it heretofore provided for, to be

used toward the construction of its railroad between Roseville Junction and said Oregon line, and that it will pay to said Pacific Improvement Company the balance of said four million five hundred thousand dollars of bonds in its mortgage bonds, part of an issue by it provided for an indenture of mortgage by it made to William E. Brown, and Frank N. Douty, bearing date October first, 1886, and that it will make said last mentioned payment as the work on said road progresses, and sections of not less than ten miles between Delta and the Oregon state line are completed and in the proportion which the completed section shall bear to the whole length of the road between the points last aforesaid.

In Testimony Whereof, The parties hereto have caused these presents to be signed by the respective Presidents and Secretaries, and their corporate seals to be hereunto affixed. Done in triplicate the day and year first herein written.”

Prior to the execution of either of said two last mentioned contracts, the stockholders of the Oregon and California Railroad Company became and were organized under the name “Stockholders’ Committee”; certain of the owners of the mortgage bonds hereinbefore mentioned became and were organized under the name “Frankfort Bondholders’ Committee”; and certain other of the owners of said bonds became and were organized under the name “London Bondholders’ Committee”—said Bondholders’ Committee representing the owners of substantially all of the aforesaid first mortgage bonds and second

mortgage bonds of said Oregon and California Railroad Company.

On March 28, 1887, the parties to the same made and entered into a written contract—a correct copy of which is “Exhibit E” to Bill of Complaint, and, omitting signatures, is as follows:

“This agreement made and entered into this 28th day of March, One Thousand Eight Hundred and Eighty-Seven, by and between George Henry Hopkinson, Robert Davie Peebles, Patrick Buchan and Charles Edward Bretherton, the Stockholders’ Reconstruction Committee of the Oregon and California Railroad Company, and who are hereinafter called the Stockholders’ Committee, of the first part; the Pacific Improvement Company, a corporation created, organized and existing under the laws of the State of California, of the second part; Lawrence Harrison, Andrew Haas, Henry Hopkinson, George Henry Kearton and Lawrence James Baker, a committee sitting in London, England, and representing the British holders of the First Mortgage Bonds of said Oregon and California Railroad Company, hereinafter called the London Bondholders’ Committee, of the third part; Heinrich Hohenemser, Hermann Koehler, Karl Pollitz, Adolph Otto, Phillip Bonn, Heinrich Oswalt, Siegmund Lion and Emil Kalb, a committee sitting in Frankfort, Germany, and representing the German holders of the First Mortgage Bonds of said Company, hereinafter called the Frankfort Bondholders’ Committee, of the fourth part; the Southern Pacific Company, a corporation created, organized and existing under

and by virtue of the laws of the State of Kentucky, of the fifth part, the said Oregon and California Railroad Company, of the sixth part, and the Union Trust Company of New York, a corporation created, organized and existing under and by virtue of the laws of the State of New York, party of the seventh part, witnesseth as follows:.

First: The Stockholders' Committee agrees to sell to the Pacific Improvement Company, One Hundred and Seventeen Thousand, Two Hundred and Ninety (117,290) shares of the Preferred Capital Stock of the Oregon and California Railroad Company, out of the total issue of One Hundred and Twenty Thousand (120,000) shares thereof, and Sixty-Seven Thousand, Seven Hundred and Eighty-five (67,785) shares of the Common Capital Stock of said Oregon and California Railroad Company, out of the total issue of Seventy Thousand (70,000) shares thereof, and Second Mortgage Bonds of said Oregon and California Railroad Company, to the amount of their par value of Two Millions, Six Hundred and Ten Thousand Dollars (\$2,610,000), being the total issue of such Second Mortgage Bonds, and will deliver the same to the said Pacific Improvement Company, in the City of New York, on or before the first day of April, One Thousand Eight Hundred and Eighty-Seven; and the said Pacific Improvement Company, in consideration thereof, and in payment therefor, will, simultaneously with such delivery and with the deposit with the Union Trust Company of New York, by the London and Frankfort Bondholders' committees, of bonds to the

amount of at least Eight Millions, Four Hundred Thousand Dollars (\$8,400,000), par value, as hereinafter provided, deliver in the City of New York, to the Stockholders' Committee or its nominee in said city, one share of the Capital Stock of the Central Pacific Railroad Company (out of a total Capital Stock thereof not exceeding six hundred and eighty thousand (680,000) shares), against every two shares of Oregon and California Preferred Stock sold and delivered as aforesaid, and one share of Central Pacific Stock against every four shares of Oregon and California Common Stock sold and delivered as aforesaid, and will also pay the sum of Four Shillings sterling for every share of Oregon and California Preferred Stock, and of Three Shillings sterling for every share of Oregon and California Common Stock so sold and delivered. Such payments to be made by first class bankers' sight draft on London.

The Pacific Improvement Company also agrees to pay the cost of transportation and insurance of said stock and bonds to the City of New York, and of the stock of the Central Pacific Railroad to be received in payment therefor, from the City of New York to the City of London. It also agrees to pay to the nominee, in the City of New York, of the Stockholders' Committee, the sum of Two Thousand Five Hundred Dollars as a remuneration for such nominee's services in the premises, and that the Central Pacific Railroad Company, upon the surrender to it of the certificate or certificates representing the stock so to be delivered by the Pacific Improvement

Company, shall issue ten-share certificates for said stock in the name or names of such parties as may be designated by the Stockholders' Committee or its nominee in New York.

Second: In case the Stockholders' Committee shall on or before the first day of April, One Thousand Eight Hundred and Eighty-Seven, acquire the ownership or control of any additional amount of the Preferred or Common Stock of the Oregon and California Railroad Company, beyond and in excess of the amount mentioned and described in the foregoing article hereof, then and in that event the Stockholders' Committee agrees to sell and deliver the same to the Pacific Improvement Company, in the City of New York, on or before the said first day of April, One Thousand Eight Hundred and Eighty-Seven, and the Pacific Improvement Company shall pay for the same in cash and stock, at the respective rates and in the manner specified in the previous article.

Third: The Bondholders' Committees have agreed to sell to and exchange with the Southern Pacific Company, upon the terms hereinafter stated, and upon compliance with the same by the Southern Pacific Company and the Oregon and California Railroad Company or its successors, First Mortgage Bonds of said Oregon and California Railroad Company (out of the total amount outstanding of Eight Millions, Six Hundred and Six Thousand Dollars (\$8,606,000) par value), issued under and secured by the mortgage of said Company to Henry Villard, Horace White and Charles Edward Bretherton, as

trustee, dated first day of June, One Thousand Eight Hundred and Eighty-One, but of which the Farmers' Loan and Trust Company of New York is now sole Trustee to the amount at their par value of Eight Million, Four Hundred Thousand Dollars (\$8,400,000), bearing all unpaid coupons appertaining thereto. For that purpose they are to deposit the said Eight Million, Four Hundred Thousand Dollars (\$8,400,000) bonds, within forty days after the execution of this agreement, with the Union Trust Company of New York. The Southern Pacific Company, in consideration thereof, and in payment and exchange therefor, is to deliver to the said Trust Company, to be delivered by it to the Bondholders' Committees, or their nominee in the City of New York, Nine Million, Two Hundred and Forty Thousand Dollars (\$9,240,000) par value, of new bonds of the Oregon and California Railroad Company or its successors (being at the rate of One Hundred and Ten (110) per cent new bonds upon the amount of old bonds exchanged as aforesaid) carrying interest at the rate of five per centum per annum from the first day of July, One Thousand Eight Hundred and Eighty-Six (except so far as such interest may have been theretofore paid in cash as hereafter provided) and guaranteed, both principal and interest, by the Southern Pacific Company, and secured as hereinafter stated; and also to pay the sum in cash of Four Pounds (4) sterling for each now existing bond of One Thousand Dollars (\$1,000) received in exchange as aforesaid; such new bonds so to be delivered by

the Southern Pacific Company in payment and exchange as aforesaid shall be payable, principal and interest, in gold, forty years after date, and bear interest at the rate of five per cent per annum, payable half-yearly, and shall be guaranteed, both as to principal and interest by the Southern Pacific Company, and shall be secured by a mortgage to be made by the said railroad company or its successors to the Union Trust Company of New York (or such other company as shall be agreed upon by the parties) upon all the property which, at the time of such deposit of existing bonds, shall be covered by the mortgage securing such First Mortgage Bonds of the Oregon and California Railroad Company, except the amounts due for lands sold previous to the date of such deposit, and except the cash in the hands of the mortgage Trustee, and upon all extensions thereof and future acquired property in Oregon of the company making such new bonds. The net proceeds of lands sold subsequent to the date of such deposit, and of the lands included in such mortgage securing such new bonds, shall be applied to the redemption and cancellation of the new bonds by annual drawings at par, unless purchasable at a lower price, as prescribed in the mortgage. Such new mortgage is to be equivalent, in point of lien and priority, to the aforesaid existing mortgage securing the said First Mortgage Bonds, except as to such of the latter as are not now or hereafter may not be deposited by the London and Frankfort Bondholders' Committee under this agreement. The amount of the bonds to be issued under such new mortgage shall be as fol-

lows: Thirty Thousand Dollars (\$30,000) per mile for every mile of standard gauge road now or hereafter constructed or acquired and comprised in the mortgage, and Ten Thousand Dollars (\$10,000) for every mile of narrow gauge road now or at any time hereafter constructed or acquired and comprised in the mortgage. The mortgage deed shall provide for the immediate issue and delivery by the mortgage Trustee to the Mortgagor Company of Ten Million, Five Hundred Thousand Dollars (\$10,500,000) of the new bonds in nominal amount; and that thereafter the Trustee of the mortgage shall further issue One Hundred Thousand Dollars (\$100,000) par value of such bonds for each mile of road constructed between the present terminus, near Ashland, and the California state line, and Fifty Thousand Dollars (\$50,000) par value, of such bonds for each ten miles of steel rails laid down on the present lines of the Oregon and California Railroad Company, after such deposit of existing bonds, and on the completion of a rail connection between the present line of the Oregon and California Railroad Company and the line of the Central Pacific Railroad Company any unissued bonds for which the mileage shall then be constructed shall be delivered.

Provided, however, that such aggregate issue, including the amount to be delivered to the Bondholders' Committee hereunder, shall not exceed the limits of Thirty Thousand Dollars (\$30,000) and Ten Thousand Dollars (\$10,000) for each constructed mile of standard and narrow gauge line respectively, nor Twenty Million Dollars (\$20,000,000) in all. For

any additional mileage constructed or acquired either between Junction and Corvallis or elsewhere in Oregon, the Mortgage Trustee shall deliver the sum of Thirty Thousand Dollars (\$30,000) par value for each mile of standard gauge road, and the sum of Ten Thousand Dollars (\$10,000) par value for each mile of narrow gauge road; the mortgage Trustee, however, not to be compelled to accept less than ten miles of road at any one time, except in case of terminal sections. Deliveries of bonds under such mortgage are to be made by the Trustee from time to time upon presentation to it of affidavits, of the President and Chief Engineer of the Railway Company making such mortgage, to the facts authorizing delivery of such bonds under this article, and without other evidence or proof thereof. In no event, however, is the total issue of bonds secured by said new mortgage, to exceed for all the purposes in this article mentioned, the aggregate of the sum of Twenty Million Dollars (\$20,000,000). The form of such new bond, which is to be of One Thousand Dollars (\$1,000) denomination, and of the mortgage securing the same, and of the guaranty, are to be approved by the counsel of the Bondholders' Committees.

Fourth: Notwithstanding the provisions to be inserted in the mortgage deed restricting the future issue of bonds to the mileage rates above specified, the mortgage deed shall permit the Railway Company making the mortgage to require the Trustee, at any one time, or from time to time, to issue and permit the sale of such amount or amounts of bonds as the Railway Company may think fit; Provided,

however, that the proceeds of such bonds shall be received by the mortgage Trustee and not by the Railway Company or its appointees, and shall be disbursed by the mortgage Trustee to the Railway Company or its appointees, only pro rata, as and when the Railway Company would have been entitled to receive such bonds thereunder, under the foregoing articles hereof.

Fifth: In case, on or before the first day of April, One Thousand Eight Hundred and Eighty-Seven, the Bondholders' Committee shall acquire the ownership or control of any additional amount of the said First Mortgage Bonds of the Oregon and California Railroad Company, beyond and in excess of those mentioned in the third article hereof, then and in that event said Bondholders' Committees agree to sell and exchange the same with the Southern Pacific Company, upon the like terms and in consideration thereof, and in payment and exchange therefor, the Southern Pacific Company shall deliver and pay to the Bondholders' Committees, Eleven Hundred Dollars of bonds guaranteed by the Southern Pacific Company, of the character hereinabove described, and the sum of Four Pounds (4) sterling in cash for every One Thousand Dollars of such additional now existing First Mortgage Bonds of the Oregon and California Railroad Company, above mentioned, with all unpaid coupons appertaining thereto, so delivered to it for exchange, due adjustment of fractions to be made by issue of fractional certificates therefor.

Sixth: Within three months from the deposit of the bonds now belonging to or controlled by the

Bondholders' committees, with the Union Trust Company, as hereinbefore provided, the Southern Pacific Company, by notice in writing to the Union Trust Company of New York, shall declare its election, either to cause to be created new bonds by act of the present Oregon and California Railroad Company, without foreclosure, or to require the Union Trust Company, as holders of the present mortgage bonds, to obtain a decree in the pending foreclosure suit or to foreclose the mortgage in some other suit caused to be brought by it, and to purchase the property or cause it to be purchased, by its nominee or nominees, at the foreclosure sale. In case said Southern Pacific Company shall give notice of its election to cause to be created new bonds of the present Oregon and California Railroad Company, then such new bonds, duly guaranteed by the said Southern Pacific Company, shall be delivered to the said Union Trust Company, of New York, within six months from the date of such notice, to be by said Trust Company forthwith delivered to the Bondholders' Committees or their nominees in New York. If within said period of three months from the deposit of the bonds by the Bondholders' Committees as aforesaid, the Southern Pacific Company shall fail to signify its election as aforesaid, or if within said period of six months from signifying an election to cause to be created new bonds of the present Oregon and California Railroad Company, it shall fail to deliver such new bonds, so guaranteed as aforesaid to the Union Trust Company of New York, then and in either of such events this agreement shall become

void and determined, and the said Trust Company shall forthwith return to the Bondholders' Committees or their nominees, the bonds deposited by them respectively, and all payments as aforesaid, made by the Southern Pacific Company to the Bondholders' Committees, shall be forfeited and be retained absolutely by the said Bondholders' Committees.

Seventh: Simultaneously with such deposit of bonds to the amount of at least Eight Million Four Hundred Thousand Dollars (\$8,400,000) the Southern Pacific Company agrees to pay the Bondholders' Committees or their nominees in New York, by first class bankers' sight draft on London, the sum of Thirty-Three Thousand Six Hundred Pounds (33,600) sterling, being at the rate of Four Pounds (4) per bond in respect of the bonds so to be deposited. If the Southern Pacific Company shall not elect, as hereinbefore mentioned, to have the existing first mortgage foreclosed, then upon the delivery to the said Union Trust Company, of New York, of the new bonds of the character hereinbefore described, to the amount at their par or face value of Nine Million Two Hundred and Forty Thousand Dollars (\$9,240,000), the Union Trust Company, of New York, shall deliver to the Trustee of the new mortgage the Eight Million Four Hundred Thousand Dollars (\$8,400,000) par value of now existing First Mortgage Bonds so deposited with it, together with all coupons deposited therewith. In case the Southern Pacific Company shall elect to have such now existing first mortgage foreclosed, the Union Trust Company, of New York, shall under and pursuant

to the directions of the Southern Pacific Company, use such deposited bonds and coupons to bring about such foreclosure, and for the purchase of the property by the said Union Trust Company, of New York, or its nominee or nominees, at any sale or sales thereunder, and the said Union Trust Company, of New York, shall retain control of the property acquired therewith, until such new bonds to be delivered in exchange therefor under the third article hereof, shall be prepared by the corporation issuing the same, duly guaranteed by the Southern Pacific Company, and shall have been deposited with the said Union Trust Company of New York; and thereupon the property acquired shall be conveyed and turned over to the corporation issuing the new bonds, which corporation the Southern Pacific Company agrees to cause to be formed. In case of such foreclosure proceedings, the Southern Pacific Company is to cause a decree to be obtained, and a sale thereunder had and confirmed, within twelve months from the date of the execution and delivery of this instrument, or within such further time as may be fixed upon as reasonable by the counsel of the Bondholders' Committees, and of the Southern Pacific Company, or in case of their disagreement, by Benjamin H. Bristow, Esq., whose decision shall be final. In case the Southern Pacific Company fails to obtain a decree of foreclosure, and to purchase the said property within the times aforesaid, or, in case of such purchase, it fails within six months thereafter to deliver such new bonds by such new corporation, duly guaranteed by the Southern Pacific Company, to the said Union Trust Company,

of the City of New York, then, and in either of such events, the said Union Trust Company, of the City of New York, shall hold said property upon trust for the Bondholders' Committees without any claim thereupon or interest therein, by the Southern Pacific Company, under or by virtue of this agreement, or otherwise, and shall, when thereunto required by the Bondholders' Committees, convey such property to such persons or corporations as said Bondholders' Committees may in writing direct, and all payments by the Southern Pacific Company to the Bondholders' Committees, in pursuance of any of the articles of this agreement, shall be forfeited and retained absolutely by the said Bondholders' Committees. At any time after April first, One Thousand Eight Hundred and Eighty-Seven, any additional amounts of such First Mortgage Bonds acquired by the Bondholders' Committees, or either of them, shall be forthwith deposited by them in like manner with the said Union Trust Company of New York, subject to the like provisions in respect of their exchange and use in the meantime, as hereinbefore provided, in respect to the Eight Million Four Hundred Thousand Dollars (\$8,400,000) bonds deposited as aforesaid, and simultaneously with each and every such additional deposit of any amount of bonds, the Southern Pacific Company will pay to the Bondholders' Committees making the deposit, the sum of Four Pounds (4) sterling in respect of each One Thousand Dollars (\$1,000) of such additional bonds.

Eighth: On the deposit of such Eight Million Four Hundred Thousand Dollars (\$8,400,000) of now ex-

isting First Mortgage Bonds, and on the first day of July, One Thousand Eight Hundred and Eighty-Seven, and each six months thereafter, until the delivery to said Union Trust Company, of the new bonds hereinbefore referred to, the said Southern Pacific Company shall pay in London to the said Bondholders' Committees, interest at the rate of Two and One-Half ($2\frac{1}{2}$) per cent upon an amount equal to One Hundred and Ten (110) per cent upon the now existing First Mortgage Bonds of the Oregon and California Railroad Company, which shall have been theretofore deposited (with all now unpaid coupons appertaining thereto) which the said Union Trust Company, under the terms of this agreement, and the new bonds to be delivered by the Southern Pacific Company, as hereinbefore prescribed, shall bear interest at the rate of Five (5) per cent per annum, only from the last date at which the Southern Pacific Company shall have made such payment.

Ninth: It is understood and agreed that there shall not at any time between the execution of this agreement and the delivery to the Pacific Improvement Company and the Southern Pacific Company respectively of the stocks and securities to be delivered to them as hereinabove provided, be any increase of the amount of the outstanding bonds or capital stock or indebtedness of the said Oregon and California Railroad Company, or any issue of Receivers' Certificates affecting its property, or increase of the Receivers' indebtedness, or dividend, or other distribution or diminution of assets, except so far as the same may necessarily result from the operation of the road

or maintenance of the offices of the corporation:

Tenth: The Pacific Improvement Company and the Southern Pacific Company will pay to the Stockholders' and Bondholders' Committees respectively, and as part of the consideration for the sales of shares and bonds hereinbefore specified, such stock of the Central Pacific Railroad Company and such sums in cash as may be necessary to pay and provide for the fees, remuneration and liabilities of said Committees, including counsel fees and office expenses incurred by said Committees, and the services of the employees of said committees, but not exceeding in the aggregate Two Thousand Five Hundred (2,500) shares of such stock and the sum of One Hundred and Fifty Thousand Dollars (\$150,000) in cash. The audit of the London Bondholders' Committee of such accounts shall be necessary, and shall be final and conclusive as against the Southern Pacific Company and the Pacific Improvement Company. Such Twenty-Five Hundred shares are to be delivered to the Bondholders' Committees simultaneously with the deposit of bonds and the exchange of stock as hereinbefore provided, and the cash payment of One Hundred and Fifty Thousand Dollars (\$150,000), or so much thereof as may be required as aforesaid, shall be made simultaneously with the declaration in writing by the Southern Pacific Company of its election or nonelection to cause the existing first mortgage to be foreclosed.

Eleventh: When this agreement shall have been fully performed by the Pacific Improvement Company and the Southern Pacific Company respectively,

then all sums of money and assets remaining in the hands of the said Committees, or any of them, out of the proceeds of assessments or derived from other sources, excepting from the aforesaid payment of Four Pounds (4) per bond and Four (4) Shillings and Three (3) Shillings in respect of preferred and common stock respectively, shall be paid over to the Pacific Improvement Company.

Twelfth: The Southern Pacific Company further agrees to and with the Bondholders' Committees to pay all Receivers' indebtedness, as well as all costs and counsel fees, in the now pending foreclosure suit or in any foreclosure suit which it may hereafter elect to or cause to be instituted. It also agrees to pay all the charges and expenses of every description of the Union Trust Company of New York, or of its nominee or nominees for any matter or service to be done or performed by it under and in pursuance of any or either of the articles of this contract.

Thirteenth: The Southern Pacific Company further agrees with the Bondholders' Committee to pay the cost of transportation and insurance on the aforementioned bonds both from London to New York and from New York to London, and in addition thereto, one-half of a commission of Fifteen Thousand Dollars (\$15,000) which the Bondholders' Committees are to pay to their agents in New York for receiving and delivering the said bonds to the Union Trust Company of New York, and for receiving in return therefor from the said Trust Company the new bonds so to be issued as aforesaid.

Fourteenth: The Southern Pacific Company fur.

ther agrees to and with the Bondholders' Committees to cause to be stamped the certificates heretofore issued by either of such Committees, with a statement that the holder of such certificates is entitled to the benefit of this agreement, and has assented thereto. The Southern Pacific Company further agrees to designate a person in London and a person in Frankfort, who shall be authorized to so stamp such certificates, as and when they are presented by the holders thereof, without expense to such holders.

Fifteenth: The Southern Pacific Company agrees to execute a lease of the railroad of the Oregon and California Railroad Company or of its successors, for a period of at least forty years from the date of issue of the new bonds, and such railroad company agrees to execute such lease, and such lease is to form part of the consideration of the guaranty by the Southern Pacific Company of the new bonds as aforesaid. Any infirmity or invalidity of or in said lease shall not be deemed a breach of this agreement by the Southern Pacific Company or the Oregon and California Railroad Company or its successors, nor shall it in any wise affect the validity, legality or sufficiency of the guaranty of such new bonds by the Southern Pacific Company.

Sixteenth: The Pacific Improvement Company and the Southern Pacific Company further agree that, upon issue of the new bonds, hereinbefore provided, the Second Mortgage Bonds of the said Oregon and California Railroad Company, which shall have heretofore been delivered by the Stockholders' Committee to the Pacific Improvement Com-

pany, as hereinbefore prescribed, shall be cancelled, and thereupon, unless the counsel of the Southern Pacific Company and the Bondholders' Committees should otherwise determine, the First Mortgage Bonds, which shall have been deposited by the Bondholders' Committees hereunder, shall also be cancelled. Upon the cancellation of such Second Mortgage Bonds, the Pacific Improvement Company shall thereupon take all proper proceedings to have the mortgage securing the same, satisfied of record. As soon as all outstanding bonds not deposited by the Bondholders' Committees with the Union Trust Company, as hereinbefore provided, shall have been paid, or otherwise satisfied, all proper proceedings shall be taken to have the mortgage securing such now existing First Mortgage Bonds of said Oregon and California Railroad Company, satisfied of record, unless, in the joint judgment of the counsel for the Southern Pacific Company and the Bondholders' Committees, it should be deemed more expedient not then to have said mortgage so satisfied.

Seventeenth: The Union Trust Company, of New York, has executed this agreement as evidence of its acceptance of the trusts thereby assumed and undertaken by it, and the Oregon and California Railroad Company has executed this agreement as an evidence of its acquiescence and approval of the same, and of its obligation to assist in carrying out the provisions thereof.

In Witness Whereof, the parties of the first, third and fourth parts have hereunto set their hands and seals, and the parties of the second, fifth and sixth,

and seventh parts have caused their corporate names to be hereunto subscribed, and their corporate seals to be hereunto affixed by their Presidents or Vice Presidents respectively, the day and year first above written.”

(Vol. I., pp. 166–184, Record.)

Pursuant to said contract of March 28, 1887, on or about May 12, 1887, all of the capital stock and all of said Second Mortgage Bonds of the Oregon and California Railroad Company were transferred, assigned and delivered to the Pacific Improvement Company, and all of said First Mortgage Bonds were transferred, assigned and delivered to the Southern Pacific Company. The Pacific Improvement Company held said capital stock until April 9, 1901, when it assigned and transferred the same to the Southern Pacific Company, which has ever since remained and still is the owner and holder thereof. It is agreed that the admission that the transfer of this stock was thus made shall not be taken as an admission on the part of the Government that the said capital stock was not held by said Pacific Improvement Company in trust for said Southern Pacific Company, as charged in the bill. The Pacific Improvement Company owned and held the controlling interest in the Southern Pacific Company from about March, 1887, until after April 9, 1901.

The Oregon and California Railroad Company executed to the Union Trust Company a trust mortgage of date July 1, 1887, a correct copy of which is “Exhibit H” to the bill. (Vol. I., pp. 197–223, Record.)

This instrument was not formally executed and acknowledged until January 3, 1888, and purports to be a trust mortgage to secure bonds of the par value of \$20,000,000, and for that purpose to convey all the railways and railway lines of the Oregon and California Railroad Company, including all rights of way and other railroad property necessary to the operation thereof, and all the rolling stock, all the rents, issues and profits of the property, and all the property, real, personal and mixed, which on May 12, 1887, was covered by the mortgage securing the then existing First Mortgage Bonds of the Oregon and California Railroad Company, except the amounts due for lands sold previous to such date, and except the cash in the hands of the trustee under the mortgage last referred to, and was to include and cover also all extensions thereof and future acquired property in the State of Oregon. This mortgage is the one relied upon and pleaded by the Union Trust Company in its amended answer. A subdivision of this mortgage reads as follows:

“And all the property, real, personal or mixed, which on the twelfth day of May, 1887, was covered by the mortgage securing the then existing First Mortgage Bonds of the Oregon and California Railroad Company.”

and it is agreed that this referred to a certain deed of trust executed by the Oregon and California Railroad Company to Henry Villard, Horace White and Charles Edward Bretherton, as trustees, bearing date June 1, 1881, a correct copy of which is “Exhibit I” to the Bill of Complaint (Vol. I, pp. 224–260, Rec-

ord). The trust mortgage of July 1, 1887, was recorded on January 20, 1888, page 287, Book 63 of the Records of Mortgages in the office of the County Recorder of Multnomah County, Oregon, and about the same time recorded in the office of the County Recorder of each of the several counties in which was situated any of the lands granted by the Acts of Congress of July 25, 1866, or May 4, 1870.

The Oregon and California Railroad Company executed and delivered certain of the bonds provided for by the trust mortgage of July 1, 1887, of which \$17,745,000 in amount are still outstanding. The payment of all these bonds, both as to principal and interest, was and is guaranteed by the Southern Pacific Company. These bonds were used, in large part, pursuant to the provisions of the contract of March 28, 1887, above set out, and were so used to retire the bonds secured by the earlier mortgages of June 1, 1881, and May 26, 1883, respectively, which had been sold abroad, and a large part of the balance of these bonds, secured by the mortgage to Union Trust Company of New York, also were negotiated abroad, and most of the bonds secured by said mortgage are now owned abroad, especially in Holland and Germany. By the issuance and negotiation of two separate issues of its corporate bonds bearing date June 1, 1881, and May 26, 1883, respectively, the Oregon and California Railroad Company provided funds aggregating approximately \$5,000,000, which were used in the construction of its railroad; and the bonds secured by the mortgage of the Oregon and California Railroad Company to the Union

Trust Company of New York, dated July 1, 1887, were used to retire the bonds secured by the mortgages of 1881 and 1883, aforesaid, and to complete the construction of the said railroad. The total amount of bonds issued under and secured by this mortgage was \$20,000,000, and from the proceeds of the sales of lands received by it, the Union Trust Company has paid off \$2,255,000 of said bonds, leaving a balance outstanding of \$17,745,000; and the Union Trust Company, as trustee for the owners and holders of said bonds, claims to have and hold a lieu upon the said granted lands under and by virtue of said trust mortgage of July 1, 1887. During the year 1887, the last section of the East Side railroad, extending from a point near Ashland to the southern boundary line of Oregon, and the section of railroad in California, extending from Delta to connection with the said East Side railroad at the southern boundary line of Oregon, were constructed by the Pacific Improvement Company.

On or about June 6, 1887, the Pacific Improvement Company and the Oregon and California Railroad Company entered into a contract, a copy of which is "Exhibit No. 10 to Stipulation," and is as follows:

"Agreement for Construction of the Oregon and California Railroad South of Ashland.

This Agreement, made this sixth day of June, 1887, between the Pacific Improvement Company, a corporation duly organized and existing under the laws of the State of California, party of the first part, and the Oregon and California Railroad Company,

a corporation duly organized and existing under the laws of the State of Oregon, and of the United States of America, party of the second part, Witnesseth:

That the party of the first part agrees to and with the party of the second part.

FIRST:

That it will construct and equip for the party of the second part that portion of the railroad and telegraph line of the party of the second part now uncompleted, commencing at a point near Ashland, in the State of Oregon, and extending southward to the northern boundary line of the State of California, to a connection, at said boundary line, with the railroad and telegraph line of the California and Oregon Railroad Company.

SECOND:

That it will construct and complete said portion of said railroad and telegraph line in a good and workmanlike manner to the satisfaction of the President and Chief Engineer of the party of the second part, and upon a line located and to be located by said Engineer; that when said railroad and telegraph line shall be completed they shall be in all respects equal to the railroad and telegraph line of the California and Oregon Railroad Company, and shall comprise all things necessary and proper for a first class single track railroad and a first class telegraph line and the operation thereof.

THIRD:

That it will equip said railroad with rolling stock (up to the standard of the California and Oregon Railroad) as follows:

1. One locomotive for every four miles in length of said road constructed by it.

2. Two passenger or mail or express cars for every five miles in length of said road so constructed.

3. Six box or flat cars for every mile of road so constructed; and

4. One hand car for every six miles of road so constructed.

The proportion of passenger, mail, express, box and flat cars to be furnished under the above specifications to be determined by the party of the second part, and all of said equipment to be furnished and delivered upon demand of said party.

FOURTH:

That it will construct and equip the said railroad and telegraph line between said Ashland and said boundary line within a reasonable time from the date hereof.

FIFTH:

That it will furnish and pay for all the engineering service (except the salary of the Chief Engineer), requisite for the location and construction of said railroad and telegraph line.

SIXTH:

That it will pay all costs, damages and other expenses henceforth incurred in procuring the right of way for said railroad and telegraph line.

SEVENTH:

That it will lay down upon the present completed line of said party of the second part first class steel rails of the same pattern and weight as those now laid upon the California and Oregon Railroad, to any

extent which the party of the second part may, within two years from the date hereof request, and that it will lay said rails in a good and workmanlike manner and to the satisfaction of the President and Chief Engineer of the party of the second part.

And,

This Agreement further Witnesseth: That the party of the second part agrees to and with the party of the first part as follows:

FIRST:

That it will pay to the party of the first part for each and every mile of said railroad and telegraph line constructed and equipped by said party of the first part as aforesaid, One Hundred Thousand Dollars of its new Mortgage Bonds, with the coupons thereon, the issue of which is provided for in the third subdivision of an Agreement made and entered into in the year 1887, between George Henry Hopkinson, Robert Davie Peebles, Patrick Buchan and Charles Edward Bretherton, the Stockholders' Reconstruction Committee of the Oregon and California Railroad Company, the Pacific Improvement Company, a corporation organized and existing under the laws of the State of California; Lawrence Harrison, Andrew Haes, Henry Hopkinson, George Henry Kearton and Lawrence James Baker, a committee representing the British holders of the First Mortgage Bonds of the Oregon and California Railroad Company; Heinrich Hohenemser, Hermann Koehler, Carl Pollitz, Adolph Otto, Phillip P. Bonn, Siegmund Lion and Emil Kalb, a committee representing the German holders of the First Mortgage

Bonds of said Company; the Southern Pacific Company, a corporation organized and existing under the laws of the State of Kentucky and the laws of the United States of America, the Oregon and California Railroad Company, and the Union Trust Company, a corporation organized and existing under the laws of the State of New York; said payment to be made upon the construction, equipment and acceptance by the party of the second part of each section of ten miles or final fraction of such section of that part of said railroad and telegraph line the construction of which is hereinbefore provided for, said construction and acceptance to be established by the affidavits of the President and Chief Engineer of the party of the second part.

SECOND:

That it will pay to the party of the first part for every ten miles of steel rails laid by it under the provisions of this contract, upon the completed portion of the railroad of the party of the second part, Fifty Thousand Dollars in Bonds with the coupons thereon, of the issue referred to in the subdivision hereof next preceding, and will make said payment of Fifty Thousand Dollars in said Bonds for every ten miles of rails so laid when the fact of their having been laid in accordance with the terms of this contract has been established by the affidavits of the President and Chief Engineer of the party of the second part.

THIRD:

That the party of the first part may use its name in any proceeding necessary to obtain the right of

way for said railroad and telegraph line to be by it constructed.

And,

This Agreement Further Witnesseth: That should the party of the second part become dissatisfied with the manner of the prosecution of the work herein provided for, and the party of the first part should fail or refuse when requested to remove the cause of such dissatisfaction, or to prosecute said work as required by the party of the second part or to perform any of the conditions of this agreement on its part to be performed, then the party of the second part may take possession of all the work finished or unfinished, and of all equipment, and also of all the tools, horses, carts, wagons, provisions, material and other things used in the construction of said railroad and telegraph line, or purchased for that purpose, and may complete the said railroad and telegraph line and the equipment thereof, in the manner herein provided, at the expense of the party of the first part, the profit or loss as the case may be, to be received or sustained by the party of the first part.

In Testimony Whereof, the parties hereto have caused this Agreement to be signed by their respective Presidents and Secretaries, and their respective Corporate Seals to be hereto affixed.”

(Vol. IV., pp. 1697-1702, Record.)

At the time of the execution of this contract, a large part of said work of construction had been performed by the Pacific Improvement Company, but it is not intended by the parties to the stipulation in the record to stipulate whether this prior work of

construction was performed pursuant to the contract of October 11, 1886, or some other contract, or otherwise.

On or about June 6, 1888, the receivership proceedings were dismissed, the receiver discharged, and all of the First Mortgage Bonds and Second Mortgage Bonds (not including the bonds issued under the Trust Mortgage of July 1, 1887), together with all mortgages and trust deeds securing the payment thereof, were cancelled and discharged; and thereupon and ever since the Southern Pacific Company has continued in possession of, pursuant to its leases from the Oregon and California Railroad Company of the railroads and all property in said leases described.

On February 7, 1891, the Board of Directors of the Oregon and California Railroad Company adopted a resolution, a copy of which is "Exhibit No. 11 to Stipulation" (Vol. IV., pp. 1702-1710, Record). On March 14, 1892, the Oregon and California Railroad Company, by its Board of Directors, adopted a resolution, a correct copy of which is "Exhibit No. 12 to Stipulation" (Vol. IV., pp. 1710-1713, Record); the forms of deeds therein set forth are the forms of deeds referred to in Subdivision 8, third paragraph of the Bill of Complaint (Vol. I., p. 52, Record.)

2,422,708 acres of the lands of the East Side grant were patented to the Oregon and California Railroad Company between 1893 and 1906, both years inclusive, and 128,618.13 acres of the lands of the West Side grant were patented to the Oregon and

California Railroad Company between the years 1895 and 1903, both years inclusive; which patents were issued from time to time between said dates, pursuant to applications made therefor by the Company from time to time between the years 1876 and 1906. No patent has issued to the Company under either of said land grants since the year 1906, except supplemental Patent No. 3, dated June 21, 1909, for 161.75 acres of land in the indemnity limits of the said East Side grant. A rapidly increasing demand for the lands of the Company, in large quantities and at increased prices, commenced about 1889 or 1890, and has continued ever since. From about 1894 to 1903, the Company sold and disposed of some of its granted lands to persons not actual settlers, in quantities exceeding 160 acres to one person and at prices exceeding \$2.50 per acre, and in several instances between said dates the Company sold lands of the said grants in quantities of from 1,000 to 20,000 acres to one person, at prices ranging from \$5.00 to \$20.00 per acre, in one instance at \$35.00 per acre, in one instance at \$40.00 per acre, and in one instance a sale of 45,000 acres at \$7.00 per acre was made by the said Company to a single purchaser. It has heretofore made approximately 5,306 sales of its land grant lands, aggregating 820,000 acres; approximately 4,930 of these sales were for quantities not exceeding 160 acres to one purchaser, aggregating about 296,000 acres, and approximately 376 of these sales were for quantities exceeding 160 acres to one purchaser, aggregating about 524,000 acres. Substantially all of the said 524,000 acres were sold to persons other

than actual settlers, who purchased the land for purposes other than settlement, and at prices in excess of \$2.50 per acre. Approximately 478,000 of these 524,000 acres were sold since the year 1897; approximately 370,000 acres of these 524,000 acres were sold to 38 purchasers, in quantities exceeding 2,000 acres to each purchaser. Approximately three-fourths in number of all sales made since the year 1897 were made by contracts providing for payment of purchase price in from five to ten equal annual payments, and execution of conveyance upon final payment. Many of these sales were still pending under such contracts on January 1, 1903, the conveyances under which were executed from time to time after January 1, 1903, and a considerable number of these contracts were still pending when this suit was brought. Of the total sales made, 4,508 had been fully executed and conveyances given aggregating 740,002.45 acres at the time the Joint and Several Answer of the Oregon and California Railroad Company, Southern Pacific Company and Stephen T. Gage, was first filed on September 5, 1911, and at that time 571 executory contracts were still pending, aggregating 81,684.31 acres. "Exhibit J" attached to the Bill of Complaint (Vol. I., pp. 260-272, Record), is substantially a correct statement of all conveyances of the granted lands made by the Oregon and California Railroad Company and of all contracts pending at the time it was compiled on July 1, 1908. The apparent discrepancies between said "Exhibit No. 4" and "Exhibit J" are explained by the fact that "Exhibit No. 4" is compiled with refer-

ence to the original date of sales, while "Exhibit J" is compiled with reference to the date of executed conveyances, except as to pending contracts; and the classification of sales (as to purchase price and quantity sold to each purchaser) in "Exhibit No. 4" differs from the classification used in "Exhibit J."

On or about September 5th, 1911, when the Joint and Several Answer of the Oregon and California Railroad Company, Southern Pacific Company and Stephen T. Gage was filed, there remained unsold of these granted lands 2,360,492.81 acres, of which 2,075,616.45 acres were theretofore patented to the Company under these land grants, and 284,876.36 acres thereof at that time remained unpatented; all of which are claimed by the Company under and by virtue of these land grants.

Approximately 1,800,000 acres of the unsold lands are situated southerly from Eugene, and constitute more than one-third, in alternate sections, of all lands lying within approximately twenty miles on each side of the East Side railroad from Eugene to the southern boundary line of Oregon; only a small portion of these granted lands in that part of the East Side grant has ever been sold.

Since January 1st, 1903, and principally since February 14th, 1907, persons exceeding four thousand in number have severally applied to the Company to purchase certain of these unsold lands in quantities not exceeding 160 acres to each person; said applicants claiming that they desired such lands to settle and establish a home upon, and in a few instances claiming that they had settled and established a

home upon the lands applied for by them; and at or about the time these applications were made, each applicant stated that he then was willing and able to tender payment at the rate of \$2.50 per acre for the lands applied for by him, and in a few instances such tender was made.

On or about January 1st, 1903, the Company withdrew from sale all the unsold lands, and at all times refused and still refuses to approve or accept any of the applications to purchase just mentioned, claiming that all the lands so applied for are essentially timber lands, unsuitable for any other purpose. The Company now assumes and asserts an absolute and unconditional estate in and to all of the said unsold lands.

“Exhibit K” to the Bill (Vol. I., pp. 273–519, Record), as corrected by “Exhibit No. 5” to the Answer (Vol. II., pp. 987–1002, Record), contains a correct list and description of all the unsold lands which have been heretofore patented.

“Exhibit No. 6” to the Answer (Vol. II., pp. 1002–1039, Record), contains a correct list and description of all unsold unpatented primary lands, and of all unsold selected but unpatented indemnity lands (claimed by the Company under the said land grants). The reasonable value of these unsold lands exceeds the sum of \$30,000,000.

The Company has, in addition to the purchase price received from sales of the said granted lands, received and enjoyed the following other benefits on account of said granted lands, between April 1st, 1870, and April 30th, 1911, to wit:

A large number of contracts of sale had been forfeited because of defaults in payment of the annual installments due thereon, and installments previously paid, amounting in all to \$88,205.06 have been retained by the Company; a portion of said lands has, from time to time, been leased for certain rentals therefor paid the Company, amounting in all to \$5,532.07. The Company has cut and used large quantities of timber growing upon the land, receiving the benefit therefrom to the amount of \$18,850.25, a reasonable stumpage value thereof at the times of such cutting. The Company has also received in addition thereto \$10,687.92, collected from persons who, without its permission or consent, cut timber growing on the lands. These figures state, substantially, the correct value of all growing timber cut by or with the consent of the Company from the unsold lands, and the amount received by the Company for growing timber cut by others from these lands without its consent. The Company has not cut nor permitted others to cut timber growing on these lands since the commencement of this suit. All of these unsold lands now are and at all times since this suit was brought have been withdrawn from sale by the Company.

Until about the year 1890 or 1891 there was substantially no demand for these granted lands, except for the purpose of settlement or by persons of limited means able to purchase such lands only in quantities not exceeding 160 acres, and at prices not exceeding \$2.50 per acre, and nearly all sales made prior to the year 1894 were of that character and to such persons.

During a large part of the time prior to the year 1894 the Company maintained an immigration bureau, engaged in inducing immigration and settlement upon said lands, and the greater part of the sales of lands to persons not settlers thereon, or in quantities exceeding 160 acres to one person, or for prices exceeding \$2.50 per acre were made after the year 1894.

“Exhibit No. 17” to Stipulation (Vol. IV., pp. 1730-31, Record), is a correct statement of the facts therein set forth, and is made for the purpose of correcting “Exhibit No. 9 to the Answer (Vol. II., pp. 1143-1148, Record). From “Exhibit No. 9,” as corrected by “Exhibit No. 17,” it appears that certain deeds were made by the Oregon and California Railroad Company and expressly approved by the Interior Department of the United States, conveying more than 160 acres of land-grant Forest Reserve lands to a single purchaser, at prices exceeding \$2.50 per acre; that such deeds were submitted by the direct or mesne grantee thereunder, as Lieu Bases for Lieu Selection of other lands, under the Act of Congress, approved June 4th, 1897, (30 Stat. 11-30). The deeds show on the faces thereof the true acreage and consideration price paid. All of these Lieu Base deeds and selections were approved by the Interior Department, excepting that some of these selections were pending in the Interior Department at the time the investigation of the subject matter of this suit was instituted, in the year 1907. Upon the recommendation of the Attorney General all of these selections pending at that time were suspended

and still remain under suspension. As to these selections thus under suspension, no action has been taken by the Interior Department and the title to the Base lands has not been approved. The selections under suspension are as follows:

To A. B. Hammond Co., under Contract No. 5392, for lands situated in Klamath County, Oregon, conveyed to the United States by deed of Marcus Daly (grantee of A. B. Hammond Co.) and wife, Sept. 14, 1899, as Lieu Base for Lieu Selection of land in Montana; 5,042.96 acres; consideration, \$17,650.36.

All of 5,013.18 acres conveyed by the Company under Contract No. 5393, of date June 24, 1899, by deed June 26, 1899, to John Claflin, for \$17,546.13, and conveyed by Marcus Daly (grantee of John Claflin) and wife on Sept. 14, 1899, as Lieu Base for Lieu Selection of land in Montana.

All of 6,214.34 acres (excepting 4014.34 acres) conveyed by the Company under its Contract No. 5394 of date June 24, 1899, by deed June 26, 1899, to Big Blackfoot Milling Company, for \$21,750.18, and conveyed to the United States by Big Blackfoot Milling Company by deed of date August 30, 1899, as Lieu Base for Lieu Selections of land in Montana.

All of the 3,760 acres conveyed by the Company to Marcus Daly under its Contract No. 5395 of date June 24, 1899, and by its deed June 26, 1899 to Marcus Daly for \$13,160.00, and conveyed to the United States by deed of Marcus Daly and wife, dated September 14, 1899.

All of the 9,044.35 acres (excepting 2787.72 acres) conveyed by the Company to R. S. Moore under its

Contract No. 5401, of date July 3, 1899, by its deed of July 5, 1899, and conveyed to United States by R. S. Moore and others as Lieu Bases for Lieu Selections in Minnesota, Oregon and Montana.

In addition to the foregoing Lieu Land Selections showing sales as stated, which are under suspension, the following Lieu base deeds, selections and sales have been approved by the Interior Department, to-wit:

Forty acres under Contract No. 5402 of date July 3, 1899, conveyed by the Company July 5, 1899, to Wm. Marlatt for \$140.00, and conveyed by him to the United States July 7, 1899, as Lieu Base for Lieu Selection of land in Oregon; Lieu Base Deed and Lieu Selection approved by Interior Department July 31, 1903.

112.96 acres conveyed by the Company under its Contract No. 5405 of date July 5, 1899, by its deed of that date to H. A. Smith for the consideration of \$395.36, and conveyed by John T. Murphy (assignee of H. A. Smith) by deed of September 1, 1899, to the United States as Lieu Bases for Lieu Selections in Montana and Idaho, and approved by the Interior Department February 9 and March 10, 1905.

522.00 acres for \$1,827.00 conveyed by the Company under its Contract No. 5409 of date July 14, 1899, by its deed of that date to A. L. Mills, and conveyed by A. L. Mills to the United States by his deeds of October 27, 1899 and April 18, 1900, as Lieu Bases for Lieu Selections in Washington; approved by the Interior Department December 13, 1901 and July 9, 1902.

640 acres for \$2,240.00, conveyed by the Company under Contract No. 5551 of date December 26, 1899, by its deed of that date to Frank D. Nash, and conveyed by him to the United States by his deed of date January 31, 1900, as Lieu Bases for Lieu Selection in Washington; approved by the Interior Department October 19, 1907.

2000 acres for \$7,500.00, conveyed by the Company under Contract No. 5598 of date February 13, 1900, by its deed of that date to W. I. Vawter, and conveyed by Vawter and wife to the United States by deed of date March 3, 1900, as Lieu Bases for Lieu Selection in Oregon; approved by the Interior Department December 20, 1902.

59.90 acres for \$209.65, conveyed by the Company under its Contract No. 5603 of date February 16, 1900, by its deed of that date, to W. I. Vawter, and by Vawter and wife conveyed to the United States by their deed of date March 8, 1900, as Lieu Bases for Lieu Selection in Oregon; approved by Interior Department March 28 and April 20, 1903.

40 acres for the consideration of \$160.00, conveyed by the Company under its Contract No. 5606 of date February 16, 1900, by its deed of that date to C. A. Cogswell, and by Cogswell and wife conveyed to the United States March 8, 1900, as Lieu Bases for Lieu Selection in Oregon; approved by the Interior Department March 1, 1903.

8,579.13 acres for the consideration of \$30,026.95, conveyed by the Company under its Contract No. 5626 of date March 2, 1900, by its deed of that date to Wm. G. Gosslin, and by W. W. Curtis (assignee

of Wm. G. Gosslin) conveyed to the United States as Lieu Bases for Lieu Selections in California, Oregon, Washington, Idaho and South Dakota, and approved by the Interior Department August 26, 1902, October 20, 1903, October 23, 1903, April 29, 1904, and December 18, 1906, respectively.

4014.34 acres conveyed by the Company under its Contract No. 5394 of date June 24, 1899, by its deed of date June 26, 1899, to Big Blackfoot Milling Company, and by that Company conveyed to the United States August 30, 1899, in connection with a conveyance of 6214.34 acres for which the Company received \$21,750.18, and which Lieu Base Deed and Lieu Selections were approved by the Interior Department October 28, 1902, February 5, 1903, and July 12, 1907, respectively.

Also 2787.72 acres conveyed by the Company under its Contract No. 5401, in connection with its conveyance of 9,044.35 acres for the total consideration of \$31,655.22, under its Contract No. 5401 of date July 3, 1899, and conveyed by it July 5, 1899, to R. S. Moore, and by him conveyed to the United States, and Lieu Base Deed and Lieu Selections approved by the Interior Department April 7, 22 and 27, 1903. January 9, 1904, and June 1, 1907.

On February 14, 1907, the Legislature of Oregon adopted a Memorial ("Exhibit L," Vol. I, pp. 520-21, Record), as follows:

"To his Excellency, the President, and Honorable Senate and House of Representatives of the United States of America:

Your memorialist, the legislative assembly of the

State of Oregon, most respectfully represents:

That vast tracts of public lands within Oregon are claimed and held by the Oregon & California Railroad Company, as grantee in succession, under the acts of Congress of the United States of July 25, 1866, and April 10, 1869;

That said tracts are withdrawn from sale, whereby the development and material prosperity of the State is retarded;

That said railroad company, so claiming said lands, has not complied with the terms of said act of April 10, 1869, as to the terms of sale and the quantities of land to be sold;

That said conditions are claimed to inure only to the United States as grantor to the predecessor in alleged interest of said Oregon & California Railroad Company, and have not been complied with; therefore,

Your memorialist most respectfully asks that the Congress of the United States be and hereby is requested to enact such laws and take such steps by resolution, or otherwise, as may be necessary to compel said railroad company to comply with the conditions of said grant, and to enact and declare some sufficient penalty for noncompliance therewith by way of forfeiture of the grant, or otherwise, as in the wisdom of Congress may seem best.

That the Senators and Representatives in Congress from the State of Oregon and all other land grant states be and they hereby are requested to use their utmost endeavor to procure the needed legislation in the above matter.

That this memorial be forwarded to the President and to Oregon Senators and Representatives in Congress.”

This memorial was communicated to Congress immediately after February 14, 1907, Congress adopted a Joint Resolution, approved April 30, 1908 (35 Stat. 571), pursuant to which this suit is brought.

Since the commencement of this suit, forty-five other and separate suits have been brought in the name of the United States, each against the defendants to the stipulation and another person or other persons asserting and praying for the enforcement of claimed rights and equitable remedies pertaining to certain of these granted lands subject to such suits, sold and conveyed by the Company to such other persons in alleged violation of alleged provisions or conditions of the said land grants.

Pursuant to the rules and regulations of the Department of the Interior, all of the patents to the Company were issued and based upon applications in writing therefor, from time to time filed in the appropriate land office of the United States by the Company as the “successor and assignee” of the said East Side Company and West Side Company, respectively; which applications contained description lists of the lands claimed and for which patents were so applied for; each of these applications was accompanied and supported by an affidavit signed and sworn to by the Land Agent of the Company duly authorized, alleging among other things that “the lands are vacant, unappropriated, and are not interdicted mineral, nor reserved lands, and are of the

character contemplated by the granting Act" under which patents were applied for, and issued as stated.

The contracts and deeds executed by the Company prior to about the year 1894, contained, substantially, the following reservation clause:

"Reserving, however, a strip of land one hundred feet wide, to be used by the Oregon and California Railroad Company for right of way or other railroad purposes, when the railroad of said Oregon and California Railroad Company or any of its branches is or shall be located upon the premises, and the right to use all water needed for the operating and repair of said railroad, and also reserving all claim of the United States to the same as mineral lands."

The words "and also reserving all claim of the United States to the same as mineral lands" were stricken from this reservation clause in the contracts and deeds executed by the Company from about 1894 until about 1902; and in contracts and deeds executed by the Company during and at all times after about the year 1902, the words "and also reserving and excepting from said described premises so much thereof as may be mineral lands" were substituted for the said stricken-out words.

The Company claims to be the owner of all rights, lands and interest in lands at any time excepted or reserved by this clause.

The defendants, Southern Pacific Company, Stephen T. Gage and Union Trust Company, parties to the stipulation, with the Oregon and California Railroad Company, claim that the latter company is and

claims to be the owner of these granted lands, primary and indemnity, patented and unpatented, not heretofore sold and transferred by its deeds of conveyance, together with all right of way and other rights and property in Oregon described as granted by section 3 of the Act of July 25, 1866, and the first section of the Act of May 4, 1870, and all the rights and property reserved as stated for any and all railroad purposes, and the improvements upon all of these lands and property, and claim that all of the land and property is subject to the Trust Mortgage of July 1, 1887.

“Exhibit No. 13” to Stipulation (Vol. IV, pp. 1713-1717 Record), contains a correct statement of all maps of survey and location filed in the office of the Secretary of the Interior Department by the East Side Company and the Oregon and California Railroad Company, and the dates thereof, under and pursuant to the provisions of the East Side Grant; and a correct statement of the map filed in the same office by the West Side Company, under and pursuant to the West Side grant, with the date of such filing, from which it appears that a map of the first section, extending from East Portland to Jefferson, was filed October 29, 1869; and of the second and third sections from Jefferson south, March 26, 1870; of the fourth section January 7, 1871; of the fifth section April 6, 1882; of the sixth section April 6, 1882, both of which maps of the fifth and sixth sections were returned by the Commissioner of the General Land Office to the Secretary of the Interior with report, and received back by the Commissioner June

2, 1883, Map of the seventh section was filed August 24, 1882, returned to the Secretary with report and re-returned to the Commissioner of the General Land Office June 2, 1883. Map of the eighth section was filed June 6, 1883; of the ninth section July 3, 1883; of the tenth section September 4, 1883; of the eleventh section August 1, 1883; on the twelfth section, to the southern boundary of the State of Oregon, August 18, 1884.

The map of survey and location of first section of the West Side Company, extending from Portland via Forest Grove and McMinnville, thence southerly towards Corvallis was transmitted to the Interior Department and there received July 1, 1868, and returned July 6, 1868, for verification and other requirements, and a second map received by the Interior Department September 16, 1868; and a map of the first sixty miles was returned to the Interior Department and there received September 22, 1868. Subsequently there was forwarded to and received by the Secretary of the Interior on September 24, 1868, another map of the first sixty miles, and such map was sent by the Secretary of the Interior to the Commissioner of the General Land Office November 22, 1871; and a map of the section extending from Portland to McMinnville and from Forest Grove to Castor Creek was filed May 17, 1871; and a map of the remainder of the line from Castor Creek to Astoria was filed February 2, 1872.

“Exhibit No. 14 to the Stipulation” (Vol. IV, pp. 1717-1720, Record), contains a correct statement of the dates of construction, completion, approval and

acceptance of the several sections of the said East Side and West Side railroads, separately stated, and shows that construction of the first section of twenty miles of the East Side railroad was completed December 24, 1869, examined by commissioners and favorably reported upon December 31, 1869; such report submitted by the Secretary of the Interior January 26, 1870, to the President of the United States and its acceptance recommended, and such recommendations approved by the President January 29, 1870; .

The second, third and fourth sections of the East Side road of twenty miles each, extending from Parrott's Creek to a point about one-half mile beyond the station of the City of Albany, 80 miles from the initial point, was completed during the year 1870, reports of Commissioners dated September 28, 1870, as to second and third sections, and December 10, 1870, as to fourth section, were transmitted by the Secretary of the Interior February 28, 1871, to the President of the United States, with recommendations that the road be accepted, and such recommendations were approved by the President February 28, 1871.

The fifth and sixth sections of twenty miles each were completed and reports of Commissioners on such completion dated respectively August 11, 1871, and January 13, 1872, were submitted March 7, 1872, by the Secretary of the Interior to the President of the United States with recommendations that the line be accepted, which recommendations were approved by the President March 11, 1872.

The seventh, eighth and ninth sections, beginning at a point $2\frac{1}{2}$ miles northwest of Eugene City and ending near Roseburg, a distance of 77.3668 miles, was completed in 1872 and had been in effective use for traffic since the summer of that year. The report of the Commissioners dated December 27, 1876, was submitted by the Secretary of the Interior to the President of the United States July 10, 1878, with recommendations that the railroad be accepted, and such recommendations were approved by the President July 11, 1878.

The tenth section of 45 miles, beginning a short distance south of the Roseburg depot, was wholly in operation from May, 1883, and 28 miles thereof, from Roseburg to Riddle had been in operation since November, 1882. The report of the Commissioners of date August 6, 1883, was submitted by the Secretary of the Interior to the President of the United States August 20, 1883, with recommendations that the line be accepted, and such recommendations were approved by the President August 29, 1883.

The eleventh section of 100 miles in length, extending from a point 45 miles south of Roseburg to a point about $11\frac{1}{4}$ miles south of Ashland was open for public use on the following dates: From the north end to Glendale, 20 miles, May 14, 1883; to Grants Pass, 55 miles, December 4, 1883, to Phoenix, 91 miles, February 25, 1884; to Ashland, 99 miles, May 5, 1884. The report of the Commissioners was submitted by the Secretary of the Interior to the President January 13, 1887, with recommendations that the section be accepted, Said recommendations were

approved by the President January 29, 1887.

The twelfth section, extending from the point $1\frac{1}{2}$ miles south of Ashland to the boundary line between Oregon and California, a distance of 24.135 miles, was completed prior to June 20, 1888; the report of the Commissioners transmitted by the Secretary of the Interior to the President October 23, 1889, with recommendations that the railroad be accepted, and such recommendations were approved by the President November 8, 1889. At the date of each approval by the President, patents for the lands opposite to and coterminous with the completed sections of the road were directed to be issued.

The first section of 20 miles of the West Side railroad was completed and the report of the Commissioners of date January 6, 1872, was approved and the section accepted by the Secretary of the Interior February 16, 1872.

The second section, extending from the 20th mile post to the Yamhill River, a distance of $27\frac{1}{2}$ miles, was reported on by Commissioners May 3, 1876, and the reports approved and the section accepted by the Secretary of the Interior June 23, 1876.

“Exhibit No. 11” (Vol. II, pp. 1152–54, Record) is a correct schedule showing the amount of land patented, compiled by years, separately stated as to the East Side and West Side grants, and also gives the dates of all Acts of Congress recited or referred to in such patents, and this Exhibit shows the following:

"EAST SIDE GRANT.

Year	Acts of Congress Recited	Acres
1871	July 25, 1866—June 25, 1868.....	152,764.67
1872	Act 1866 and 1868 and April 10 1869	69,061.63
1876	Acts 1866, 1868 and 1869.....	14,629.67
1877	Acts 1866, 1868 and 1869.....	86,622.71
1893	Acts 1866, 1868 and 1869.....	292,486.90
1894	Act 1866	382,352.95
1895	Act 1866	558,718.40
1896	Patent 31 recites Lieu Act of June 22nd, 1874, and Act of July 25th, 1866; all others recite Act of 1866	709,729.99
1897	Act of July 25th, 1866.....	37,231.90
1898	Act of July 25th, 1866.....	70,014.02
1899	Act of July 25th, 1866.....	151,064.30
1900	Act of July 25th, 1866.....	42,841.33
1901	Act of July 25th, 1866.....	60,466.60
1902	Patents 178 and 180, Lieu Act of June 22nd, 1874, and Act of July 25th, 1866; all other Acts of 1866	36,166.20
1903	Patent 189 recites Lieu Act of June 22, 1874, and Act of 1866; all others recite Act of July 25, 1866	36,438.08
1904	Act of July 25, 1866.....	39,339.08
1905	Act of July 25, 1866.....	25,838.67
1906	Act of July 25, 1866.....	20.
1909	Acts of 1866-1868 and 1869.....	161.75

Total2,765,948.85

"WEST SIDE GRANT.

Year	Acts of Congress Recited	Acres
1895	Act of May 4th, 1870.....	93,079.
1896	Act of May 4th, 1870.....	32,288.24
1897	Act of May 4th, 1870.....	2,388.
1898	Act of May 4th, 1870.....	72.75
1899	Act of May 4th, 1870.....	520.
1903	Act of May 4th, 1870.....	270.14
Total		128,618.13

Total acres, both grants.....2,894,566.98

All of the West Side grant patents recited that they were issued to the Oregon and California Railroad Company "as successor to the Oregon Central Railroad Company," but no patent issued for lands of the East Side grant contains a recitation that it was issued to the Oregon and California Railroad Company "as successor to any Company."

"Exhibit P" to the Bill of Complaint (Vol I., pp. 529-537, Record), gives a correct list of suits, with lands specifically described, therein referred to, being the suits of thirty-eight so-called cross-complainants who claim to be actual settlers upon lands situated in the East Side grant, and twenty-eight cross-complainants who claim to be actual settlers upon lands within the limits of the West Side grant. These suits during the month of December, 1908, other than the one brought by Roy W. Minkler, were consolidated with this suit, and each of the complainants in the said several suits filed his cross-complaint, of which the cross-complaint of John L. Snyder and others is typical. On June 9, 1910, the suit brought

by Roy W. Minkler was dismissed by mutual consent of all parties thereto.

On June 19, 1878, Congress passed an Act (20 Stat. 169) entitled "An Act to create an Auditor of Railroad Accounts and for other purposes," a copy of which is marked "Exhibit 15 to Stipulation" (Vol. IV., pp. 1721-1724, Record).

Congress, by an Act entitled "An Act making appropriations for the legislative, executive and judicial expenses of the Government for the fiscal year ending June 30, 1882, and for other purposes," approved March 3, 1881 (21 Stat. pp. 385-413), among others, provided that the Auditor of Railroad Accounts should be thereafter styled "Commissioner of Railroads" and from time to time by various acts of Congress (31 Stat. 86; 31 Stat. 960-1009; 32 Stat. 419-481; 32 Stat. 1083-1147) made appropriations for the office of Commissioner of Railroads and extended the terms of office and continued him in the performance of his duties, and as provided by said Act of June 9, 1878, the Bureau of the Interior Department was organized and continuously administered as such under annual appropriations from Congress until the termination of said Bureau and the transfer of the duties, files and records thereof to the Secretary of the Interior in the year 1904, as required by the Act of March 3, 1903.

That pursuant to the requirements of the Act of June 9, 1878, the forms of reports to be made by the railroad companies contemplated by the Act, including the Oregon and California Railroad Company, were prepared and adopted by the Bureau of the

Interior Department and transmitted to the railroad companies, including the Oregon and California Railroad Company, by the said Bureau from 1879 to 1903, and the Oregon and California Railroad Company complied with the provisions of this Act and the demands of the Bureau as to the making of said reports upon such forms as prescribed continuously from 1879 to 1903, both years inclusive.

That beginning with the report for the half year ending December 31, 1879, and continuing down to and including the year 1903, reports were made of the transactions of the Land Department of the Oregon and California Railroad Company, upon these blanks formulated and furnished therefor by the said Bureau of the Interior Department, which are particularly set out in detail in Volume IV, pages 1595-1611, Transcript of Record (to which reference is here made and which is made a part hereof), from which reports there appears among other things, the following:

A statement of the average price per acre for all sales to date:

Average price per acre for all sales during half year;

Average price per acre for all purchases to date;

Maximum price per acre from sales;

Minimum price per acre from sales;

Maximum price per acre now asked;

Minimum price per acre now asked;

Average price per acre now asked;

and showing that for the half year ending December 31, 1879, the Company received a maximum price per

acre from sales of \$15.00, and the maximum price per acre asked was \$7.00, and for the half year ending June 30, 1880, the maximum price per acre from sales received was \$5.00 and the maximum price per acre asked was \$7.00, and thereafter for the period stated the maximum and average price received and the maximum price asked was as follows;

For the half year ending December 31, 1880:

Maximum price per acre from sales. . . . \$ 5.00

Maximum price per acre asked. 5.00

For the half year ending June 30, 1881:

Maximum price per acre from sales. . . . \$10.00

Maximum price per acre asked. 5.00

For the half year ending December 31, 1881:

Maximum price per acre from sales. . . . \$ 5.00

Maximum price per acre asked. 10.00

For the half year ending June 30, 1882:

Maximum price per acre from sales. . . . \$ 3.50

Maximum price per acre asked. 15.00

For the half year ending December 31, 1882:

Maximum price per acre from sales. . . . \$15.00

Maximum price per acre asked. 7.00

For the half year ending June 30, 1883:

Maximum price per acre from sales. . . . \$15.00

Maximum price per acre asked. 7.00

For the year ending June 30, 1884:

Average price per acre for all sales during year. \$ 2.7250

Maximum price per acre from sales. . . . 15.00

Maximum price per acre asked. 7.00

For the year ending June 30, 1885:

Average price per acre for all sales during year. \$ 2.5608

Maximum price per acre from sales. . . . 15.00

Maximum price asked. 7.00

For half year ending December 31, 1885:

Average price per year for all sales during half year. \$ 2.65

Maximum price per acre from sales. . . . 15.00

Maximum price asked. 7.00

For the year ending December 31, 1885:

Average price per acre for all sales during year. \$ 2.70

Maximum price per acre from sales. . . . 15.00

Maximum price per acre asked. 7.00

For the half year ending June 30, 1886:

Average price per acre for all sales during half year. \$ 2.99

Maximum price per acre from sales. . . . 15.00

Maximum price per acre asked. 7.00

For the half year ending December 31, 1886:

Average price per acre for all sales during half year. \$ 2.99

Maximum price per acre from sales. . . . 15.00

Maximum price per acre asked. 7.00

For the year ending December 31, 1886:

Average price per acre for all sales during year. \$ 2.99

Maximum price per acre from sales. . . . 15.00

Maximum price per acre asked. 7.00

For the half year ending June 30, 1887:

Average price per acre for all sales during half year. \$ 3.19

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Maximum price per acre from sales.. 15.00

Maximum price per acre asked..... 7.00

For the half year ending December 31, 1887:

Average price per acre for all sales during half year.....\$ 3.40

Maximum price per acre from sales... 15.00

Maximum price per acre asked..... 7.00

For the year ending December 31, 1887:

Average price per acre for all sales during year.....\$ 3.24

Maximum price per acre from sales.... 15.00

Maximum price per acre asked..... 7.00

For the year ending December 31, 1888:

Average price per acre for all sales during year.....\$ 3.74

Maximum price per acre from sales.... 15.00

Maximum price per acre asked..... 10.00

For the year ending June 30, 1889:

Average price per acre for all sales during year.....\$ 4.96

Maximum price per acre from sales.... 15.00

Maximum price per acre asked..... 15.00

For the year ending June 30, 1890:

Average price per acre for all sales during year.....\$ 6.32

Maximum price per acre from sales.... 15.00

Maximum price per acre asked..... 15.00

For the year ending June 30, 1891:

Average price per acre for all sales during year.....\$ 4.92

Maximum price per acre from sales.... 30.00

Maximum price per acre asked..... 25.00

For the year ending June 30, 1892:

Average price per acre for all sales during year.....\$ 5.61

Average price per acre for all sales to date..... 3.61

Maximum price per acre from sales.... 30.00

Maximum price per acre asked..... 25.00

For the year ending June 30, 1893:

Average price per acre for all sales to date.....\$ 3.66

Average price per acre for all sales during year..... 4.51

Maximum price per acre from sales.... 30.00

Maximum price per acre asked..... 25.00

For the year ending June 30, 1894:

Average price per acre for all sales to date.....\$ 3.63

Average price per acre for all sales during year..... 2.83

Maximum price per acre from sales.... 30.00

Maximum price per acre asked..... 25.00

For the year ending June 30, 1895:

Average price per acre for all sales to date.....\$ 3.40

Average price per acre for all sales during year..... 3.49

Maximum price per acre from sales.... 30.00

Maximum price per acre asked..... 15.00

For the year ending June 30, 1896:

Average price per acre for all sales to date.....\$ 3.40

Average price per acre for all sales during year..... 3.57

Maximum price per acre from sales... 30.00

Maximum price per acre asked..... 15.00

For the year ending June 30, 1897:

Average price per acre for all sales to date.....\$ 3.40

Average price per acre for all sales during year.... 3.35

Maximum price per acre from sales... 30.00

Maximum price per acre asked..... 15.00

For the year ending June 30, 1898:

Average price per acre for all sales to date....\$ 3.41

Average price per acre for all sales during year..... 3.95

Maximum price per acre from sales... 30.00

Maximum price per acre asked..... 15.00

For the year ending June 30, 1899:

Average price per acre for all sales to date.....\$ 3.75

Average price per acre for all sales during year.... 2.62

Maximum price per acre from sales... 30.00

Maximum price per acre asked..... 15.00

For the year ending June 30, 1900:

Average price per acre for all sales to date\$ 3.77

Average price per acre for all sales during year..... 5.02

Maximum price per acre from sales... 30.00

Maximum price per acre asked..... 15.00

For the year ending June 30, 1901:

Average price per acre for all sales to date.....	\$ 4.076
Average price per acre for all sales dur- ing year.....	5.348
Maximum price per acre from sales...	30.00
Maximum price per acre asked.....	15.00

For the year ending June 30, 1902:

Average price per acre for all sales to date.....	\$ 5.00
Average price per acre for all sales dur- ing year.....	7.85
Maximum price per acre from sales...	30.00
Maximum price per acre asked.....	20.00

For the year ending June 30, 1903:

Average price per acre for all sales to date	\$ 4.73
Average price per acre for all sales dur- ing year.....	4.22
Maximum price per acre from sales...	30.00

The Bureau of the Interior Department made annual reports to the Secretary of Interior as required by the said Act of June 19, 1878, from 1879 to the termination of said office. These reports were embodied in the annual reports of the Secretary of the Interior for the same years, transmitted by him to the President of the United States and by the latter to the two Houses of Congress, and the said Secretary's annual reports were there referred to appropriate committees and printed as Executive Documents (Vol. IV, Subdivision 21, Item 10, p. 1612, Record).

In the reports so made, embodied, transmitted, referred and printed, appear the following relating to the Oregon and California Railroad Company:

(1st)—For the year 1883, Executive Documents, 2nd Session, 47th Congress, 1882-83, No. 1, Part 5, Vol. 2, page 471:

“Oregon & California Railroad Company chartered March 17, 1870, and opened for business December 1st, 1872. The Company is now successor, by consolidation, of the Oregon Central Railroad Company, purchased September 1st, 1880, chartered July 25, 1866, and owns the land grant of said Company; the Western Oregon Railroad Company, purchased October 9, 1880; and the Albany & Lebanon Railroad Company, leased December 5, 1880, at a rental of \$1 for each period of six months, this Company to pay taxes and keep up repairs. The several lines are operated in two Divisions, that is:

EAST SIDE DIVISION:	Miles
Main Line, Portland to Roseburg.....	198.
Lebanon Branch, Albany Junction to Lebanon	11.5
WEST SIDE DIVISION:	
Portland to Corvallis	97.

 Total, exclusive of side-tracks..... 306.05

“The estimated grant of land to these combined companies amounts to 3,940,000 acres, of which 322,-062.40 acres have been patented to June 30, 1882. Of this latter amount lands had been sold up to December 31, 1881—date of last report—for an amount aggregating \$309,486.15, at an average price of \$2.25

per acre. The minimum price now asked is 25 cents, the *maximum* \$10 per acre.

(5th)—For the year 1889, House Executive Documents, 1st Session, 51st Congress, 1889-90, Vol. II, pages 512, 513:

“The Company has received by patent from the Government 323,068.88 acres of land, of which 269,442.88 have been sold. It has received from sales of land \$541,650.33, and there are outstanding on account of time sales \$394,226.58, of which the sum of \$98,992.42 is interest.

“The average price per acre for all sales to date was \$2.64, while the average price for sales made during the year was \$3.96.”

(6th)—For the year 1890, House Executive Documents, 2nd Session, 51st Congress, 1890-91, Vol. 13, page 174:

“The Company reports that to June 30, 1890, there had been patented to it by the United States, 323,068.68 acres of land, and that 225,170.57 acres had been sold, the total cash receipts from all sales amounting to \$626,520.03. There remained outstanding on account of time sales the sum of \$516,287.66. *Average price per acre for all sales during the year was \$6.32.*

(11th)—For the year 1895, House Document, 1st Session, 54th Congress, 1895-96, Vol. 16, page 156:

“The records of the General Land Office show that to June 30, 1895, there had been patented to the Company 1,162,067.28 acres.

The Company submitted the following report on

June 30, 1895, of the operations of its Land Department to date:

	Acres.
Acquired by United States patent	1,163,073.56
Disposed of for cash and on time con-	
tracts	381,402.78

Difference, unaccounted for 781,670.78

“The Company also reports that the total cash receipts from all sales to date had amounted to \$946,952.81, and that there remained outstanding on account of time sales the sum of \$700,064.64, principal and interest.

“The receipts during the year were \$37,747.22, and the expenses \$59,294.90.

“*The average price per acre for all sales to date had been \$3.40, and the average price now asked is \$3.00.*”

(12th)—For the year 1896, House Documents 2nd Session, 54th Congress, 1896–97, Vol. 14, page 166:

“The records of the General Land Office show that to June 30, 1896, there had been patented to the Company 2,180,366.07 acres.

“The Company reports that to June 30, 1896, it had received by patent from the United States, 2,397,717.17 acres of land, and there had been disposed of for cash and on time contracts 387,119.43 acres, leaving the balance owned by the Company, 2,010,657.74 acres.

“The total cash receipts from all sales to date amounted to \$986,605.69, and there remained outstanding on account of time sales, principal and interest, \$875,146.35.

“The report of the operations of the Land Department during the year, shows a deficit of \$81,770.68.

“*Average price per acre received was \$3.57.*

“*Average price per acre now asked, \$3.00.*

(13th)—For the year 1897, House Documents, 2nd Session, 55th Congress, 1897–98, Vol. 14, page 137:

“The records of the General Land Office show that to June 30, 1897, there had been patented to the Company 2,287,131.66 acres.

“The Company reports that to June 30, 1897, it had received by United States patents 2,503,754.59 acres of land, and had disposed of for cash and on time contracts (not including cancelled contracts), 382,443.44 acres.

“The total cash receipts from all sales to date amounted to \$1,020,329.75, and there were outstanding on account of time sales \$775,881.34.

“The receipts for the year were \$33,724.06, and the expenses \$60,012.11.

“*The average price per acre now asked for land is \$3.00.*”

(14th)—For the year 1898, House Documents, 3rd Session, 55th Congress, 1898–99, Vol. 16, page 152:

“The Company reports that to June 30, 1898, it had received by United States patent 2,561,685.30 acres of land, and had disposed of for cash and on time contracts (not including cancelled contracts), 504,606.53 acres.

“The total cash receipts from all sales to date amounted to \$1,069,513.25, and there were outstanding on account of time sales \$792,999.38.

“The receipts for the year were \$49,183.50, and

the expenses \$73,183.06.

“The average price per acre now asked for land is \$3.00.”

(15th)—For the year 1899, House Documents, 1st Session, 56th Congress, 1899–1900, Vol. 20, page 181:

“The Company reports that to June 30, 1899, it had received by United States Patent 2,659,300.56 acres of land.

“The total cash receipts from all sales to date amounted to \$1,234,225.97, and there were outstanding on account of time sales \$734,957.16.

“The receipts for the year were \$164,712.72, and the expenses \$77,138.22.

“The average price per acre now asked for land is \$3.00.”

(16th)—For the year 1900, House Documents, 2nd Session, 56th Congress, 1900–01, Vol. 29, page 185:

“The Company reports that to June 30, 1900, it had received by United States patent 2,787,363.55 acres of land.

“The total cash receipts from all sales to date amounted to \$1,542,728.71, and there were outstanding on account of time sales, \$1,189,918.71.

“The receipts for the year were \$308,502.74, and the expenses \$91,932.33.

“The average price per acre now asked for land is \$3.00.”

(17th)—For the year 1902, House Documents, 1st Session, 37th Congress, 1901, Vol. 25, page 218:

“The Company reports that to June 30, 1901, it had received by United States patent 2,795,567.64 acres of land.

“The total cash receipts from all sales to date amounted to \$1,852,756.51, and there were outstanding on account of time sales, \$1,808,935.66.

“The receipts for the year were \$310,027.80, and the expenses \$72,713.77.

“The average price per acre now asked for land is \$3.50.”

(18th)—For the year 1903, House Documents, 2nd Session, 58th Congress, 1903–1904, Vol. 21, page 159:

“The Company reports that to June 30, 1903, it had received by United States patent 2,928,809.55 acres of land, and had disposed of, for cash and on time contracts, 1,032,591.47 acres.

“The total cash receipts from all sales to above date amounted to \$2,735,532.88, and there were outstanding on account of time sales, principal and interest, \$2,800,637.57.

“The receipts from this source for the year amounted to \$437,471.63, and the expenses to \$105,936.96.

“The average price per acre now asked for land is \$4.73.”

The original reports by the railroad companies to the Commissioner of Railroads and by the latter to the Secretary of the Interior, and by the latter to the President and by the President to Congress, for the years mentioned, are treated as having been offered and received in evidence subject to any objection of the parties that the same or any part thereof may be irrelevant and immaterial, and that for the purpose of showing the use made by Congress of these reports and for the further purpose of show-

ing whether the fact that lands were sold by the Company for prices in excess of \$2.50 per acre was considered by Congress or any of the Committees thereof, and if so to what extent, it is stipulated that all parties may refer generally to the Reports of Congressional Committees, Congressional debates, and other proceedings shown by the Congressional Globe or Congressional Record, and other recognized official reports; subject to the right to object to all or any part of the same as incompetent, irrelevant and immaterial, but that no objection as to competency shall go to the identification of the same.

All Committee Reports and debates in Congress as appearing in the official printed copies of the Congressional Globe or Congressional Record, and all other proceedings in Congress which appear in any recognized official reports, relating to the enactments of the Acts of Congress approved July 25, 1866, June 25th, 1868, April 10th, 1869, May 4th, 1870, January 31st, 1885, and September 29th, 1890, referred to in the pleadings, are stipulated as having been offered and received in evidence subject to any objection for incompetency, irrelevancy and immateriality, but no objection as to competency shall go to the identification thereof.

“Exhibit 16 to Stipulation” (Vol. IV, pp. 1725–1729, Record) contains a correct statement of the stock quotations therein set forth, showing the quotations of Central Pacific Railroad Company stock and bonds, Eastern and Foreign markets.

All of the foregoing facts have, in substance, been stipulated by the parties—the United States, the

Oregon and California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, and the Union Trust Company, individually and as trustee. (Vol. IV, pp. 1552-1731, both inclusive, Record.)

From the oral testimony and exhibits introduced upon behalf of the parties, the following facts, among others, appear:

The Act of June 25, 1868, was passed at the request of the West Side Company.

The Act of April 10, 1869, was introduced at the request of the East Side Company.

Two days after the approval of this act of April 10, 1869, John H. Mitchell, as attorney for the East Side Company, addressed a letter to the Secretary of the Interior reciting the terms of the Acts of July 25, 1866 and April 10, 1869, concerning the time for filing assent, in which he said:

“This assent will be presented for filing as soon as I can return to Oregon and have a resolution for that purpose adopted by the company.”

At a meeting of the stockholders and board of directors of the East Side Company held on March 28 and 29, 1870, that Company was dissolved.

In October, 1880, the stockholders of the Oregon Central Railroad Company (East Side Company) by resolution approved the conveyance to the Oregon & California Company, and passed the following resolution:

“Resolved, that this company, the Oregon Central Railroad Company be, and the same is hereby, dissolved, to take effect on the transfer

of the property of this company and the settling of its business."

No lands were patented to the West Side Company under the Act of 1866.

All applications for patents filed with the Government by the Oregon & California Railroad Company requested that the patents be issued to it as the successor and assignee of the East and West Side Companies respectively.

The mortgage held by the Union Trust Company is guaranteed by the Southern Pacific Company. The amount due thereon is \$17,745,000. In addition to the lands in controversy, the mortgage covers 660 miles of railroad lines, and other property of the Oregon & California Railroad Company. This road was worth, at the time the mortgage was given, \$50,000 per mile, and is worth more now.

The West Side Company commenced construction on April 15, 1868, and the East Side Company the next day. (Vol. IV, p. 1760, Record.) During the year 1868 the West Side Company built the big bridges on the first five miles, and graded the first five miles of track. (Vol. IV, p. 1760, Record.)

The circular identified as Government's Exhibit No. 104, being an address to the people of Oregon by the East Side Company, was issued May 1, 1868 (Vol. IV, p. 1766; Vol. X, p. 5158, Record). It was sent to a great many people all over the Willamette Valley. This circular purports to be issued by the directors of the East Side Company and gives the capital stock of the company, the estimated actual cost of the road, the proposed issuance of first

mortgage bonds, and a history of the organization of the company, and the controversy with Joseph Gaston, and his action in attempting to procure the designation of the West Side Company by the legislature on October 10, 1866; also a history of the litigation between the two companies as to the use of the name, and replies to a circular issued from Portland, of date January 1, 1868, issued in the name of J. Gaston, President, and W. C. Whitson, Secretary, of the West Side Company, which it was claimed was unauthorized; also the recital that at that time two lawsuits were pending, one commenced by Gaston to invalidate the incorporation of the East Side Company, and the other commenced to test the legality of the West Side Company. This paragraph also appears therein:

“The charge has been extensively circulated that we are seeking to defraud the west side of the river of a valuable franchise—of State and Government aid—in answer to which we have only to say, that we recognize that the Act of Congress granting lands, and the Act of the last legislature of Oregon, are both inoperative, from the fact that the terms and stipulations of those Acts have not been, and cannot be, complied with. Any aid to be granted railroad enterprises in Oregon must be re-enacted by both the State and General Government, and we have no hesitation in affirming that we claim no grants, privileges or rights for our Company we do not desire also extended to the west side of the valley. Our Company has never entertained or expressed any hostility to the West Side road, or deemed its

progress an obstacle in our pathway, but on the contrary, we have often expressed to members of the West Side Company a desire to harmonize our interests, and work to mutual advantage." (Vol. X, pp. 5172-3, Record.)

Mr. Gaston testified (Vol. IV, p. 1777, Record), that when Mr. Reed came back from Washington and failed to get the legislation in shape, which he wanted, or "prevent the legislation of the East Side Company," the West Side Company abandoned the contract with S. G. Reed & Company, and it was apparent to Gaston then that they would not be able to build the road in time, that is, the first section of its railroad, in compliance with the Act of Congress. Subsequently they took steps to get another land grant. Gaston further testified (Vol. IV, p. 1795, Record) that the Board of Directors represented the West Side Company, and it was decided to apply for a new grant, without any reference to the old grant. It was simply concluded that the company never could earn the grant nor get it, and the thing to do was to get a new grant, if possible; also that he went to Washington in December, 1869, and at that time the conclusion was that the West Side Company was unable to comply with the Act of Congress, and from that they assumed that they had lost the grant. The West Side Company was unable to build its first twenty miles before December 24, 1869, within the time required by the Act of June 25, 1868, and he and his associates thought the grant was lost. (Vol. IV, p. 1812, Record.) It also appears from the testimony that the controversy be-

tween friends of the East Side Company and the West Side Company entered into the state election in June, 1868, and that there was a geographical division, the West Side counties as far south as Benton, favoring the West Side Company, and the East Side counties, as far south as Lane, favoring the East Side Company, and the Southern Oregon counties favoring the East Side Company, and the rest of the state more or less divided.

It was stipulated that the court should take judicial notice of the pleadings, records, files, and proceedings in each of the suits in equity referred to in Exhibit No. 10 of the Joint and Several Answer of the defendants Oregon and California Railroad Company, Southern Pacific Company, and Stephen T. Gage. (Vol. IV, p. 1902, Record.)

On January 19, 1869, Geo. H. Williams, United States Senator from Oregon, addressed to Secretary of the Interior O. H. Browning, a letter of that date (Vol. IV, pp. 1910-11, Record), calling the attention of the Secretary to the Act of July 25, 1866, and enclosed with his letter a pamphlet entitled "Statement of Facts," which purported to set forth the rights and claims of the East Side Company, and also enclosed a paper signed by nine members of the Oregon Senate, protesting against the action of the legislature in October, 1868, in which the rights and claims of the West Side Company, designated in October, 1866, are fully stated. In the course of that letter Senator Williams says: "I have nothing to say as to the rights or claims of either company, but in view of the fact that the Articles

of Incorporation of the West Side Company were not filed in the office of the Secretary of State until after its designation by the legislature in 1866, and in view also of the fact that the East Side Company cannot file its assent as required by the Sixth Section of said Act, I am apprehensive that the benefits of said Act will be wholly lost to the State unless something is done to prevent it. Will you be good enough to advise me if there is anything in the action of your Department or the views you entertain of this matter making unnecessary the proposed legislation."

To this letter Secretary Browning, on January 20, 1869, replied (Vol. IV, pp. 1912-14, Record). In that letter Secretary Browning acknowledged receipt of the letter of Senator Williams, and copy of S. Bill 770, to amend "An Act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California, to Portland, in Oregon, approved July 25th, 1866," with other papers relating to the subject. After discussing the provisions of the Act of July 25, 1866, Secretary Browning says:

"By a resolution adopted by the Legislature, October 10, 1866, the Oregon Central Railroad Company was designated to locate and construct said road in Oregon. Two companies called the Oregon Central Railroad Company claimed to have been so designated. These it appears are locally called the East Side Company and the West Side Company. At the date of the adoption of said resolution by the legislature, neither company had been organized as

required by the laws of Oregon. The West Side Company, however, filed its assent with this Department within the year.

“By a resolution adopted by the legislature in October, 1868, the East Side Co. was designated. The purpose of the bill as understood, is to authorize this company to file its “assent” without prejudice to the rights or interests of the other company, and you ask for an expression of my views as to whether there is any necessity for the proposed legislation. In reply I have the honor to state, that as the matter now stands, the grant so far as the portion of the road in Oregon is concerned, has lapsed, while the grant for that portion of the road situate in California is still in force, and some legislation by Congress is necessary to revive the grant for the Oregon portion of the road. The proposed bill, if it becomes a law, will, in my opinion, accomplish that purpose.

“On the 13th instant, I declined to act upon maps filed by the West Side Company, ‘in the absence of a judicial decision as to the rights of the claimants, or some action by Congress upon the subject.’ ”

It is admitted that by a letter dated January 20, 1869, Joseph Gaston transmitted to the Secretary of the Interior a copy of Government’s Exhibit No. 106, entitled, “Inside History of the Oregon Central Railroad Company,” which was filed in the office of the Secretary of the Interior on March 15, 1869. (Vol. IV, p. 1884, Record; Government’s Exhibit No. 106, Vol. X, pp. 5228–5291, Record.) This document was so filed, and bears date January 9, 1869, and purports to be a document authorized by

the Board of Directors of the West Side Company at its meeting of December 28, 1868. It was prepared by Joseph Gaston, President of the West Side Company. After stating the reasons for its issuance, it contends that the West Side Company is legally and equitably entitled to the grant, and that the East Side Company has no legal or equitable rights thereto; that the East Side Company was not legally incorporated, and that it has been repudiated by the people of Oregon, and that its advocates have admitted the priority of the rights of the West Side Company. This document sets out a copy of the letter of Secretary Browning of date July 17, 1868, addressed to A. M. Loryea, which acknowledges the receipt of a letter from A. M. Loryea of July 16, 1868, enclosing a certified copy of a resolution purporting to be an acceptance by the East Side Company of the grant made by the Act of July 25, 1866, and that the Secretary refused to file the same because by law the company was required to file an "assent" to its terms and conditions within one year, and that time expired July 25, 1867.

On April 29, 1868 (Vol. X, p. 4996, Record) the East Side Company adopted the following resolution:

"Resolved, That the O. C. R. R. Company hereby accepts any grant of land which may have been made, or may be extended to said Company and our agent, A. M. Loryea, is hereby fully empowered to present a duly certified copy of this Resolution to the proper authorities as provided by Law to be filed."

On June 9, 1868, the East Side Company adopted

the following resolution:

“Resolved, That the O. C. R. R. Co. hereby accepts any grant of land which may have been made, or may be extended to said company by Congress. And the officers of this company are hereby directed to file a duly authenticated copy of this resolution with the Secretary of the Interior, Washington, D. C.” (Vol. X, p. 5003, Record.)

On November 25, 1868, the East Side Company adopted the following resolution: (Vol. X, p. 5026, Record.)

“Whereas, the Legislature of the State of Oregon, at its late session in October, 1868, by Joint Resolution designated “The Oregon Central Railroad Company,” of Salem, Oregon, Incorporated April 22nd, 1867, under the laws of Oregon, as the Company to take, manage and control the Land Grant given in aid of the construction of a railroad and telegraph line from Portland, Oregon, southerly through the Willamette, Umpqua and Rogue River Valleys, by Act of Congress of date July 25th, 1866;

“And Whereas, such legislature failed to designate any company until after the expiration of one year from the date of the passage of said Act of Congress,

“Therefore, Resolved that this company, The Oregon Central Railroad Company of Salem, Oregon,—organized April 22nd, 1867, does hereby accept such grant, and does assent thereto, upon the terms and conditions specified in said Act of Congress of July 25th, 1866, granting aid as aforesaid; and, resolved further,

“That the Secretary of this company be and he is hereby instructed to prepare a true and certified copy of this preamble and resolution, together with a certified copy of such Joint Resolution, being known as Senate Joint Resolution No. 16, under the seal of this company, and forward the same forthwith to the office of the Secretary of the Interior, and have the same filed in such office as the assent of this Company to the grant aforesaid.”

And on the same day adopted the following resolution:

“Whereas, J. H. Mitchell, the attorney of this corporation, has proposed without charge or expense to this company to go East and represent this company before Congress and the Departments at Washington City, therefore

“Resolved, that J. H. Mitchell be and he is hereby authorized and empowered to represent this corporation and its interests as agent and attorney thereof, before the Congress of the United States, and the Departments at Washington, to the end that all necessary legislation by Congress and action by such Departments may be had in order to secure and promote its interests.”

On July 16, 1868, A. M. Loryea wrote to Secretary Browning, enclosing therewith a certified copy of resolution of the East Side Company, as follows: (Vol. XIV, page 7454, Record.)

“Office of the
Oregon Central Railroad
Company.

Salem, April 30, 1868.

This is to certify that at a regular meeting of the Board of Directors of the Oregon Central Railroad Company, held at the office of the Company, Salem, April 29th, A. D. 1868, the following was passed as the unanimous action of said Board of Directors:

‘Resolved, That the Oregon Central Railroad Company hereby accepts any grant of land which may have been made, or may be extended to said Company, and our Agent, A. M. Loryea, is hereby fully empowered to present a duly certified copy of this resolution to the proper authorities as provided by law to be filed.’

Witness my hand and the seal of said corporation this the day and year above written.

(Seal)

S. A. CLARKE,
Secretary O. C. R. R. Co.”

Secretary Browning replied, July 17, 1868, as follows: (Vol. XIV, page 7440, Record.)

“Department of the Interior

Washington, D. C., July 17, 1868.

Sir:

I have received your letter of the 16th instant and accompanying paper, purporting to be an acceptance by the Oregon Central Railroad Company of the grant made by the Act of July 25, 1868.

By law the Company was required to file an ‘assent’ to its terms and conditions, within one year. That time expired July 25, 1867, and this paper, if

sufficient for that purpose, could not now be received.

I state for your information that J. Gaston, President of the Oregon Central Railroad Company, within the time prescribed in the act filed an assent which was received.

In compliance with your request I inclose a copy of my letter of the 8th instant to Mr. Gaston in regard to maps to be filed in this Department.

Very respectfully,

Your obt. servant,

A. M. Loryea, Esq.,

O. H. BROWNING,

Present.

Secretary."

"It was stipulated by and between the parties that the Court may take judicial notice of the decisions of the Secretary of the Interior and the Commissioner of the General Land Office, and the rules and regulations of the Land Department, of the reports of either of these officers to Congress, and the reports of any committee of Congress and the action of Congress thereon; subject to the objection that may be made by either party to the same, or any thereof, as incompetent, immaterial, or irrelevant, or any other objection which might legally be interposed, it being intended to waive the actual production of these documents, to save expense, and the encumbering of the record." (Vol. V, page 2531, Record.)

Also:

It was stipulated between the parties that the Court in any stage of this case until and including a final hearing in the Supreme Court of the United States, if the case shall reach that court, shall take

judicial notice of all proceedings had in and final disposition of the forty-five suits against purchasers referred to in the "Stipulation as to the Facts," including issuance of patents to the lands therein described when issued, if any shall be issued, which stipulation, it was agreed, was subject to the objection on the part of complainant that the evidence is immaterial and irrelevant." (Vol. V, pages 2530-1, Record.)

Also:

"It was stipulated that the Central Pacific Railroad Company completed the construction and equipment of the California and Oregon Railroad from Chico to the south boundary line of Oregon in several sections, all on or before June 20, 1888; that the said entire constructed railroad was examined by commissioners appointed for the purpose and favorably reported on by them; that such report was submitted by the Secretary of the Interior with his favorable recommendations to the President, and such recommendations approved by the President, all on or before November 8, 1889." (Vol. V, pages 2630-1, Record.)

Also:

"It was further stipulated by and between the parties that the following documents were recorded, in the manner provided by law, in the Records of Deeds and Mortgages of Multnomah County, Oregon, at the dates hereinafter mentioned, and thereafter, and about the same time, in the Records of Deeds and Mortgages of the other counties of Oregon in which

any part of the lands involved in this suit are situated, to-wit:

Oregon and California Railroad Company to Faxon D. Atherton and Milton S. Latham, of date April 15, 1870, recorded April 16, 1870, at page 745, Book C, of the Records of Mortgages of Multnomah County, Oregon;

The Oregon Central Railroad Company to Milton S. Latham and Faxon D. Atherton, Trustees, of date July 15, 1871, recorded at page 132, Book E, of the Records of Mortgages of Multnomah County, Oregon, October 14, 1871;

The Oregon and California Railroad Company to Milton S. Latham, Faxon D. Atherton and William Norris, Trustees, of date April 15, 1870, recorded at page 727, Book K, of the Records of Deeds of Multnomah County, Oregon, April 18, 1870;

Oregon and California Railroad Company, Richard Koehler, Heinrich Hohenemser and others, to Klaas Van Oterendorp and Philip N. Lilienthal, Trustees, of date January 1, 1881, recorded February 28, 1881, at page 346, Book X, of the Records of Mortgages of Multnomah County, Oregon;

Oregon and California Railroad Company to Henry Villard, Horace White and Charles Edward Bretherton, Trustees, of date June 1, 1881, recorded August 18, 1881, at page 1, Book 27, of the Records of Mortgages of Multnomah County, Oregon;

Oregon and California Railroad Company to Henry Villard, Robert Davie Peebles and Charles Edward Bretherton, Trustees, of date June 2, 1881, Recorded September 13, 1881, at page 179, Book 27,

of the Records of Mortgages of Multnomah County, Oregon;

Oregon and California Railroad Company and Robert Davie Peebles, George H. Hopkinson and Patrick Buchan, to Farmers Loan and Trust Company, of date May 26, 1883, recorded at page 33, Book 41, on that date, in the Records of Mortgages of Multnomah County, Oregon;

Oregon and California Railroad Company to Union Trust Company of New York, of date July 1, 1887, recorded January 20, 1888, page 287, Book 63, of the Records of Mortgages of Multnomah County, Oregon;

Deed executed by Oregon Central Railroad Company to Oregon and California Railroad Company, of date March 29, 1870, recorded April 14, 1870, page 702, Book K, of the Records of Deeds of Multnomah County, Oregon;

Deed of Oregon and California Railroad Company, Milton S. Latham, Faxon D. Atherton and William Norris, to European and Oregon Land Company, of date March 28, 1871, recorded page 223, Book N, of Records of Deeds of Multnomah County, Oregon, April 4, 1871;

Deed from the European and Oregon Land Company to Milton S. Latham, Faxon D. Atherton and William Norris, Trustees, and others, of date July 25, 1874, recorded page 264, Book Z, of the Records of Deeds of Multnomah County Oregon, on January 4, 1875;

Deed from Oregon Central Railroad Company to Oregon and California Railroad Company, of date

October 6, 1880, recorded at page 555, Book 42, Records of Deeds of Multnomah County, Oregon, on October 6, 1880.

It is further stipulated and agreed that either party may at any time furnish a certified copy of either of said documents herein above set out, and the same shall be admitted in evidence subject to any objection that the same is incompetent, irrelevant or immaterial; and this stipulation is made subject to any objection that either party may desire to make to the same, or any part thereof, as incompetent, irrelevant or immaterial. These certified copies are in evidence.

It is further stipulated that, with respect to all of the conveyances, deeds of trust, mortgages and other documents above described, such proceedings were had that at the time of the filing of the bill of complaint, and at all times subsequent thereto, no parties had any right, title, or interest in or to, or lien upon, any of the lands involved in this suit, other than the defendants herein; the sole purpose of this portion of the stipulation being to avoid any question of defect of parties defendant.

It is further stipulated that the court may take judicial notice of the pleadings, proof and final decree in the cases of *United States v. Oregon and California Railroad Company*, *John A. Hurlburt and Thomas L. Evans*; and *United States v. The Oregon and California Railroad Company and Oregon Central Railroad Company*—the latter named case commonly known as the “*Quadrant Case*”; and both of which cases reached the Supreme Court of the United

States; and that either party, without being compelled to produce the records, may refer to any part of said record, including all pleadings, stipulations of fact, and other proceedings in each of said suits, subject to any objection that the same may be incompetent, irrelevant or immaterial, all parties reserving the right to introduce at any time to complete the record a certified copy of such pleadings, papers, stipulations, decrees or other proceedings in either of said cases, or any thereof, subject as aforesaid to any objection of either party that the same may be incompetent, irrelevant or immaterial.

It is further agreed between the parties hereto that the stipulations of fact signed by the parties in said causes were prepared by the attorneys for the defendants therein, and submitted to the Attorney General, who signed them." (Vol. V, pages 2531 to 2535, Record.)

"It was stipulated between counsel for the respective parties that Deed No. 2046, of date July 3, 1893, consideration \$1,958.82, was executed pursuant to contract No. 1804, of date Feb. 16, 1883, executed to A. C. Cunningham; and that the deed of date March 14, 1892, executed by Oregon and California Railroad Company to the City of Portland for the Northwest quarter of the Southwest quarter and the Southwest quarter of the Southeast quarter of Section 23, Township 1 South, Range 4 East, W. M., and the North half of the Southwest quarter of Section 5, Township 2 South, Range 5 East, W. M., containing 160 acres, was executed pursuant to contract No. 3827, but date of contract is not given in deed and date is

unknown to counsel at this time.

It was further stipulated that at a meeting of the Water Board of the City of Portland of April 7, 1891, a committee was appointed to investigate these contracts and find out the amounts due, and the chairman, Henry Failing, reported that the amount necessary to pay off contracts was \$8,532.84; whereupon warrants were drawn for this amount, but deeds were not delivered until two years later, on account of final payments required according to the following memorandum, which appears on an envelope in the handwriting of Superintendent Dodge of the Water Board of the City of Portland:

Amounts paid O. & C. R. R. Co. by City of Portland:

April 17, 1891.....	\$5,958.69	
	2,574.15	\$ 8,532.84
<hr/>		
May 18, 1893.....	\$ 522.05	
	490.00	
	102.80	1,114.85
	222.30	
	208.65	
	33.00	463.95
<hr/>		<hr/>
		\$10,111.64''

(Vol. V, pages 2542-2543, Record.)

Up to April 27, 1914, decree of forfeiture had been entered as against the purchaser, grantee defendant, in twenty-eight of these forty-five so-called "innocent purchaser" suits, pursuant to the Act of August 20, 1912 (37 Stat. 320), and an order of dismissal entered against the defendants-appellants herein, in each of

these suits, the defendants, now the appellants herein, neither objecting to nor consenting to such orders of dismissal as shown thereby. Under these decrees thus entered, the different purchasers have paid to the United States, pursuant to the Act of August 20, 1912, \$852,219.95, at the rate of \$2.50 per acre, and patents have been, or will be, issued therefor. There remained on the 27th day of April 1914, seventeen suits awaiting like decree excepting that in suit No. 3464 involving 6463.72 acres, the Southern Pacific Company was the grantee purchaser of the lands involved therein, and in view of that fact, this suit stands upon demurrer to the Bill of Complaint, awaiting final determination of the appeal in the main case, although there is no express stipulation to that effect. The Southern Pacific Company paid for these lands \$248,126.86 (Vol. XIII, p. 6699, Record).

Government's Exhibit 100-A (being all of Volume IX, Record) consists of the Minute Books of the West Side Company, beginning with the first meeting of the stockholders May 24, 1867, and ending with the last meeting of the Board of Directors May 23, 1895. The minutes show a communication from Ben Holladay, as President of the Willamette Valley Railway Company, of date August 15, 1870, proposing to purchase all the right, title and interest of the West Side Company in and to the lands granted by the Act of May 4, 1870, a resolution of the Board accepting this proposition (Vol. IX, pp. 4425-7, Record), the action of the directors April 17, 1871, accepting retransfer from Willamette Valley Railway

Company on that date to the West Side Company of the lands granted by the Act of May 4, 1870; a copy of deed of that date from the Willamette Valley Railway Company to the West Side Company (Vol. IX, p. 4457, Record); copy of mortgage of July 15, 1871, executed by the West Side Company to Milton S. Latham and Faxon D. Atherton (Vol. IX, p. 4477, Record). A statement is made in the minutes that a copy of the resolutions authorizing the sale and conveyance of the property of the West Side Company, including all lands granted under the act of May 4, 1870, was forwarded to the Secretary of the Department of the Interior at Washington, D. C.,—presumably mailed on or about August 15, 1870, (Vol. IX, p. 4430 Record); and that a like copy of the resolution accepting the transfer and conveyance made by the Willamette Valley Railway Company on April 17, 1871, to the West Side Company, was also forwarded to the Secretary of the Interior at Washington, D. C.—presumably about that date (Vol IX, p. 4456, Record).

This exhibit also shows that on October 6, 1880, the West Side Company accepted the proposition of the Oregon & California Railroad Company to purchase all of the property of the former company (Vol. II, pp. 4869-72, Record), and that a deed on that date, conveying all the property of the West Side Company to the Oregon & California Railroad Company, including the lands granted under the Act of May 4, 1870, was authorized, which deed it is stipulated (Vol. IV, p. 1561, Item 5, Record) was on that date executed by the West Side Company, and delivered to

the Oregon and California Railroad Company—a correct copy of which is Exhibit “C” to the Bill (Vol. I, pp. 126–131, Record), and a certified copy of which was filed with the Secretary of the Interior October 20, 1880.

Government’s Exhibit 100–B (Vol. X, pp. 4893–5145, Record) consists of the minute books of the East Side Company, together with its stock book, and shows, among other things, the adoption of the resolution authorizing the construction contract of April 23, 1867, with Albert J. Cook (Vol. X, p. 4906, Record), under which A. J. Cook & Co. contracted to construct the first 150 miles of the East Side road. This exhibit also shows a communication from Ben Holladay & Company of date September 7, 1869 (Vol. X, pp. 5059–61, Record), as to purchase of the properties of the East Side Company; the action of the Board of Directors upon the proposition of Ben Holladay & Company of date March 28, 1870, as to settlement with the East Side Company; the offer of the Oregon and California Railroad Company of date March 28, 1870, to purchase the properties of the East Side Company, including its land grant. (Vol. X, p. 5083, Record); the agreement between the East Side Company and the Oregon and California Railroad Company of that date, and the resolution of that date authorizing the sale and transfer of the property of the East Side Company to the Oregon and California Railroad Company (Vol. X, p. 5107, Record). It appears also therefrom that on March 28, 1870 (Vol. X, pp. 5120–1, Record), the Board of Directors

of the East Side Company adopted the following resolution:

“Resolved, that the President and Secretary of this Company be and they are hereby instructed to communicate to the Secretary of the Interior, the fact that this Company has sold, assigned, transferred and conveyed to the “Oregon and California Railroad Company,” of Portland, Oregon, all its right, title and interest, in and to the lands franchises and benefits granted to the “Oregon Company by the Act of Congress of July 25th, 1866, and amendments thereto, granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California to Portland in Oregon.”

The conveyance executed by the East Side Company of date March 29, 1870, to the Oregon and California Railroad Company, is referred to in the Bill of Complaint and made a part thereof, as “Exhibit B” (Vol. I, pp. 93–125, Record), and it is stipulated (Item 17, Vol. IV, p. 1558, Record), as hereinbefore set out, that this deed was on that date delivered to the Oregon and California Railroad Company, and recorded in the office of the County Recorder of the several counties in which was situated any part of the lands granted by the Act of Congress July 25, 1866; and that the Oregon and California Railroad Company, on April 4, 1870, adopted a resolution, reciting the purchase under this deed of all the property of the East Side Company, including the lands granted under the Act of July 25, 1866, and amendments thereto, accepting the grant conferred thereby, directing its President and Secretary to file the assent of

the company thereto in the office of the Secretary of the Interior by filing a copy of the resolutions certified under the seal of the company and signed by the President and Secretary respectively, and therewith a copy of the deed, and that on April 28, 1870, the Oregon and California Railroad Company filed in the office of the Secretary of the Interior an authenticated copy of this resolution and a certified copy of the deed of March 29, 1870 (Vol. I, pp. 26-28, Record).

On October 6, 1866, George L. Woods, Governor of Oregon, in his special message to the Legislative Assembly (Government's Exhibit No. 101, Vol. X, pp. 5146-5150, Record) says:

"With a railroad running through the Willamette Valley, and via Oakland, Roseburg, Jacksonville and Yreka, to and connecting with the Central Pacific Railroad in California—thus putting ourselves in direct and speedy communication with the City of San Francisco, and the demands of our sister State, in which we have a community of interest—we should reap a benefit which cannot well be estimated. * * *

In his biennial message for the year 1864, my predecessor called the attention of the Legislature to the route first above named, and forcibly enumerated the advantages to be derived from such an enterprise; and, in accordance with the suggestions, an Act was passed, the effect of which was to aid in its construction. (Session Laws 1864, page 76.) But the amount provided for was so meager as to offer no inducement to capitalists for investment. * * *

Your attention is called to an Act of Congress of July 25, 1866,

donating twenty sections of the public lands for each mile of Railroad and Telegraph to be constructed from the City of Portland, Oregon, to and connected with the Central Pacific Railroad, in California, which lands are to be selected within thirty miles on either side of said road. This grant, though quite liberal is wholly inadequate and will not, by itself, afford sufficient security to insure investment. Capital for the completion of this great work must come from abroad, and good policy requires that we should hold out inducements for investment. I am happy to be able to communicate to you that capitalists controlling ample means for the construction of the entire road proposed, are now ready, and have signified their willingness to invest in the great enterprise as soon as the legislation necessary for such an investment can be had. * * * Under the General Incorporation Act, a corporation is about to be organized to be known as "The Oregon Central Railroad Company," composed of some of the most responsible and energetic business men of the state, whose purpose it is, if they can meet with proper encouragement, to immediately begin this great work. And I take the liberty to suggest that it would be well to make provision, by immediate enactment, by which through the above named corporation the State shall be able to reap the benefits of the liberal donations by Congress, and also to make provision for the payment of the interest on the bonds of the Company, necessary to construct and put into operation, the first section of twenty miles of the road. * * * A railroad is a public necessity. The farmers need it;

the mechanics need it; the merchants need it; all classes need it."

On January 1, 1868 (Government's Exhibit No. 102, Vol. X, pp. 5151-2, Record), the West Side Company issued a circular in the name of its officers, among other things stating:

"1st. The Oregon Central Railroad Company was incorporated and organized at the session of the Legislature held in September 1866, and received valuable grants of U. S. land, and interest on bonds from the State of Oregon. Since that time it has duly filed its papers in the office of the Secretary of the Interior at Washington, D. C., and is now engaged in the location and construction of its railroad, having large subscriptions of home means."

On May 1, 1868 (Government's Exhibit No. 102, Vol. X, pp. 5153-7, Record), the directors of the West Side Company issued another circular which it is stated was sent everywhere, among other things stating the following:

"1st. The original "Oregon Central Railroad Company" was the only corporation in this state entitled to use this name, was incorporated under the General Incorporation Act of this state, at the session of our legislature for the year 1866; and at that time went before the legislature then in Salem, and procured the passage of House Joint Resolution No. 13, which designates this company to receive all the land, and all the benefits of an Act of Congress, entitled, "An Act granting land to aid in the construction of a railroad and telegraph from the Central Pacific Railroad in California, to Portland,

Oregon," so far as the land grant is located in Oregon. (This Act of Congress gives the Company about three million acres of land.) Our Company has filed the necessary papers in the Department of the Interior at Washington, and has been officially recognized by the Secretary of the Interior. The legislature of our state, at the same session named, passed an Act pledging the state to pay interest on one million dollars of our bonds for twenty years. After receiving three grants from the state, and the recognition of our rights to the land grant, by the Secretary of the Interior, we commenced surveying our line of road upon the west side of the Willamette River, and solicited subscriptions to the capital stock of the Company, and we now have subscriptions and donations of land, cash and other valuable property in aid of the road, amounting in value to near \$300,000. In February last, the City Council of the City of Portland, upon the petition of nine-tenths of the voters of the City, passed an Ordinance, binding the City to pay interest on \$250,000 of our bonds, for twenty years, all deliverable on the first twenty miles of road. In March last the County Commissioners of Washington County, upon the petition of four-fifths of the farmers, entered into a contract, obligating the County to pay interest on \$50,000 of our bonds. On the 15th ult. we 'broke ground' in the commencement of our work, and a force is rapidly pushing the work. We submit that these facts, showing our standing at home, should give us a fair name abroad."

Government's Exhibit No. 105 (Vol. X, pp. 5176-5227, Record) purporting to be a "Statement of

Facts" relative to the incorporation and organization of the Oregon Central Railroad Company of Salem, Oregon, incorporated April 22, A. D. 1867, and reasons why such company is entitled to the benefit of the land grant given by Congress in aid of a railroad and telegraph line from Portland, Oregon, southerly through the Willamette, Umpqua and Rogue River Valleys, to the Central Pacific Road, in California, passed July 25th, 1866, and also why no other company has any legal or equitable right thereto, and printed at Portland, Oregon, by Carter & Himes, Book and Job Printers, 1868, concludes with the following statement:

"We do, therefore, feeling implicit confidence in the enterprise in which we are engaged, and in the justness of our claim to the Congressional land grant, most respectfully submit this statement of facts, and reasons why "the Oregon Central Railroad Company," of Salem, Oregon, is entitled to the grant referred to, to the exclusion of all others, to all persons, and to all officers and Departments of Government, that may be interested in relation to the same, in having justice and right prevail."

The West Side Company on January 9, 1869, pursuant to the authority of its Board of Directors taken December 28, 1868, replied to this "Statement of Facts," which reply is known in the record as Government's Exhibit No. 106 (Vol. X, pp. 5228-5291, Record). The "Statement of Facts" issued by the East Side Company and known in the record as Government's Exhibit No. 105, appears to have been issued on November 25, 1868, and was prepared

by John H. Mitchell as attorney for the East Side Company, and was undoubtedly prepared prior to the preparation of Government's Exhibit No. 106, purporting to give "the inside history of the Oregon Central Railroad Companies" which was authorized December 28, 1868, and written by Joseph Gaston, President of the West Side Company, who was authorized to prepare and publish a reply to the "recent pamphlet published by the East Side Company." (Vol. X, p. 5228, Record.)

It quotes the opinion of R. B. Boise, the Chief Justice of the Supreme Court, who heard the case brought by the West Side Company against the East Side Company, involving the use of the corporate name, wherein the court says:

"At the time the Act of Congress was passed, neither of the rival companies was in existence, and the objection made to the Resolution of the Legislature could be made with equal force to the Act of Congress; but I think the language of both the Act and the Resolution may as well refer to a company yet to be incorporated as to one already organized.

* * * The plaintiff says in its bill that the defendant, through its agents and officers, has represented that it, and not the plaintiffs, is entitled to the benefit to be derived from a compliance with the Act of Congress, to the injury and depreciation of plaintiff's credit. The defendant must be required to answer whether these things be true." (Vol. X, p. 5240, Record.)

It also appears that S. G. Reed, representing the West Side Company, addressed a written remon-

strance to Congress against extending the time for filing assent (Government's Exhibit No. 107, Vol. X, pp. 5292-7, Record), and also submitted in connection therewith (Government's Exhibit No. 108, Vol. X, pp. 5298-5310, Record) objections to the passage of Senate Bill No. 94 to amend the Act entitled "An Act granting lands in aid of a Railroad and Telegraph Line from the Central Pacific Railroad in California to Portland in Oregon," approved July 25, 1866.

In this Remonstrance, (Government's Exhibit 107) Mr. Reed says:

"The Legislature designated the Oregon Central Railroad Company. The company filed its assent to the act, and located, and is now constructing, the road, having already expended about \$100,000, and contracted for the completion of one hundred and fifty miles of road. * * * * They (East Side Company), have sought to file an assent to the act of Congress, but the Secretary of the Interior refuses to receive it, on the ground that the time has elapsed, and that the West Side Company had filed in time. They now ask to have the time extended; and against such extension the undersigned, on behalf of the West Side Company, which he represents, respectfully remonstrates. * * * * *

"The undersigned therefore prays that, instead of the pending bill, an act may be passed confirming what the first Legislature had the right to do, and tried to do, and supposed they had done."

The proposed substitute offered by Mr. Reed, which he asked Congress to pass, provided:

“That the joint resolution of the Legislative Assembly of the State of Oregon, of October 10, 1866, designating the Oregon Central Railroad Company to construct the railroad mentioned in the said act of July 25, 1866, was a lawful execution of the power vested in the said Assembly; and that the said company, by filing their assent to the said act on the 6th day of July, 1867, acquired the rights granted by the said act.”

His formal objections to the passage of Senate Bill No. 94, known as Government’s Exhibit 108, stated among other things, that the bill would infringe the rights of the West Side Company, and while it was not conceded that their rights could be destroyed by legislation, an act of Congress of the kind suggested would destroy the credit of the West Side Company and force the abandonment of the work of construction.

In the course of his objections, Mr. Reed says:

“The letter of Mr. Browning is the chief argument. It accords with the bill. It says the grant has lapsed, and the bill is necessary to revive it. It can only have lapsed because the West Side Company has not, in contemplation of law, been designated. * * * * *

“The act declares that either the Oregon or California Company, on completing its part of the road and finding the other part incomplete, shall have the right to proceed, with the consent of the State, until the whole is completed. Oregon has already given that consent by its general incorporation law, the terms of which any corporation can easily comply

with. This likewise disposes of the report of the committee, which assigns no reason for the passage of the bill, but the groundless fear that the road will lose the land,

“The title of the company first designated depends on its being, in fact, the one intended by the Legislature, and on its having filed its assent within the time; both of which are conceded. It depends not at all, as has been supposed, on its having at that time performed each and every formal act necessary to acquire the legal quality of a corporation. * * *

“The objection of want of grantee goes to the act of Congress, which contains the grant. The resolution of the legislature only selected a grantee to take a previous grant. That previous grant was void from the beginning if a grantee in being was necessary to its validity. If the grant was good until the grantee was chosen, why not until he qualified himself to take? The objection goes not to length of time, but to any time. Is not an act of Congress which departs from the common law an alteration of the latter for that case and to that extent? And is not this likewise true of an act or resolution of the legislature? And do not such statute laws put aside, for the occasion, all common law obstructions, just so far and just so long as necessary to allow the act or resolution to effect its object? This has never before been questioned.”

Senate Bill No. 94 referred to, was introduced by Mr. Williams in the Senate of the United States on March 10th, 1869, by unanimous consent was read twice on that day and referred to the Committee on

Public Lands, and ordered to be printed. As thus introduced, read and offered, omitting title and enacting clause, it read:

“That section 6 of an act entitled, ‘An act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad, in California, to Portland, in Oregon,’ approved July twenty-five, eighteen hundred and sixty-six, be, and the same is hereby, amended so as to allow any railroad company heretofore designated by the legislature of the State of Oregon, in accordance with the first section of said act, to file its assent to such act in the Department of the Interior within one year from the date of the passage of this act; and such filing of its assent, if done within one year from the passage hereof, shall have the same force and effect to all intents and purposes as if such assent had been filed within one year after the passage of said act.”

On March 22, 1869, Senator Williams, for the Committee on Public Lands, reported the bill, and in that report (Vol. X, pp. 5319–5321, Record), among other things, the Committee says:

“Congress ought not to decide between the two companies, because the questions involved are judicial in their nature, and the object of the accompanying bill is to provide so that both companies may have a standing in the courts of Oregon, and there have their legal rights and equities fully examined and adjudicated.

“To declare by act of Congress that the East Side Company shall have the grant would be unfair, for it may turn out upon investigation before the courts

that the West Side Company was legally designated in 1866, in which event that company, for aught that can now be seen, would be entitled to the land.

“To declare by act of Congress that the West Side Company shall have the grant would be equally unfair, for it appears that the East Side Company was organized and made large expenditures upon the ground that the other company was never legally designated, and it ought to have the benefits and advantages of the law in accordance with which it was organized and invested its money.

“It has been suggested that the proposed legislation is unfavorable to the West Side Company, but the bill has been framed so as to obviate that objection as far as practicable.

“If the West Side Company was legally designated in 1866, and it has since done what the act of Congress requires, it has a vested right to the grant, which the bill, if it becomes a law, will not and cannot disturb; but it is unreasonable to insist that because the company has failed to secure the grant, the State ought therefore to lose it.

“Both companies claim, and it may be that both have been designated by the Legislature, and if both are allowed to file their assent, as required by the sixth section of the act of Congress, it is made certain not only that one of the companies will get the grant, but that it will be used for railroad purposes, in which the State has more interest than in the fortunes of either company.”

On January 13, 1869, Secretary Browning wrote to Senator Williams a letter, advising that he had

received his letter of January 11th asking that certain maps filed by J. Gaston might be accepted by the Department. Secretary Browning in reply thereto says:

“In reply, I have to state that, as there are two companies of the same name claiming, under the laws of the State of Oregon, the benefit of the grant made by said act of 1866, I must decline, in the absence of a judicial decision as to the rights of the claimants, or some action by Congress upon the subject, to comply with your request.”

On June 27, 1872, Joseph S. Wilson, former Commissioner of the General Land Office, and then President of the European & Oregon Land Company, wrote a letter to Attorney-General Williams, formerly United States Senator from Oregon, calling his attention to the Act of July 25, 1866, and the amendatory act of April 10, 1869, and enclosed with this letter the opinion of S. M. Wilson of date November 11, 1871, addressed to Joseph S. Wilson as President of the European & Oregon Land Company (Government's Exhibit No. 109, Vol. X, pp. 5322-5363, Record). There was enclosed also therewith Document “A,” which was a certified copy of the deed to be executed by Milton S. Latham, Faxon D. Ather-ton and William Norris, Trustees, to the European & Oregon Land Company, to be joined in by the Oregon and California Railroad Company, purporting to convey to the European & Oregon Land Company the lands granted by the Act of July 25, 1866, subject to the terms and provisions of that certain trust deed executed by Oregon and California Rail-

road Company to Milton S. Latham, Faxon D. Atherton and William Norris as Trustees, recorded at pages 727 to 734, both inclusive, Book "K" of the records of Deeds of Multnomah County, Oregon, which trust deed was dated April 15th, 1870. This proposed conveyance was authorized by the Board of Trustees of the European & Oregon Land Company on March 27, 1871, and Document "A" is a copy of the minutes of the European & Oregon Land Company.

These documents were transmitted by Mr. Wilson in his letter of January 27, 1872, to Ben Holladay, and in that letter Mr. Wilson says:

"The Company have adopted the opinion (transcript herewith)—which has been given by the Counsel:—regarding the principles therein enunciated as just and proper, and as realizing the purposes of the grant. In order, however, that there may be a full understanding with the Executive Department of the Government, so that proceedings in disposal of the lands, may in all respects be harmonious and concurrent, it is requested that you will bring the matter to the attention of Attorney-General Williams, who is thoroughly conversant with the subject; to the end that he may request the Secretary of the Interior to dispatch an affirmation of the principles referred to, which the company would be gratified to have in the form suggested, by the draft of a letter, which I enclose herein, addressed to myself."

The Secretary of the Interior was asked to advise as follows:

"The Department has considered the papers you

referred from the European and Oregon Land Company, in right of the Oregon and California Railroad Company, under the grant in Western Oregon, by Act of Congress approved 25th July, 1866, (Statutes Vol. 14, page 239)—and the Amendatory Act of 10th April, 1869, (Stat. 1869, page 47)—and is satisfied that the construction given by the said Company is just and proper, to the effect that all actual settlers on the odd sections from 25th July, 1866, the date of the Original Grant, and all those who went on the odd sections from that date to the passage of the Act of 10th April, 1869—and all others who are found on such odd sections when the line of the railroad is surveyed and established, are protected; and have the right to purchase, each one, not exceeding one hundred sixty acres, at two dollars and fifty cents per acre—but that in regard to all other persons, the Original Absolute Grant, by Act of July 25th, 1866, is in full force and effect, and authorizes the Company to sell on such terms as may be reasonable and just to all parties without any restriction.”

Attorney General Williams, on April 20, 1872, transmitted these papers to the Commissioner of the General Land Office, who, under date of June 14, 1872, advised the Attorney General that the papers were submitted to the Secretary of the Interior, as advised in the letter of the Commissioner of date April 20, 1872, to the Attorney General, and the Commissioner enclosed with his letter of June 14th, a copy of the opinion of the Secretary of the Interior of date June 5, 1872, wherein Secretary Delano stated that he was of the opinion that

“the proviso means just what it says. ‘That the lands granted by the act aforesaid shall be sold to actual settlers only, in quantities not greater than one quarter section to one purchaser, and for a price not exceeding two dollars and fifty cents per acre.’ The legislative intention was plainly to prevent the lands from being held for speculative prices and disposed of in larger quantities to other than actual settlers; and to limit the proviso’s operation to those on the lands granted at or before the survey of the road would, in my judgment, utterly defeat such intention.”

In the opinion of S. M. Wilson of date November 11, 1871, to Joseph S. Wilson, President, European and Oregon Land Company, there is a review of the Act of Congress of July 25, 1866, and of April 10, 1869, and a statement that on March 28, 1871, the Oregon and California Railroad Company sold its interest in the grant to the European and Oregon Land Company at the rate of \$1.25 per acre for actual settlement, and he was asked his legal opinion in response to the following question:

“Are the rights of the European and Oregon Land Company in view of their purchase of the landed interests of the Oregon and California Railroad Company, so abridged by said Act of 10th April, 1869, as to restrict them in making sales, to \$2.50 per acre, or have they a right, to sell to persons applying as settlers, at such rates as may be fair and reasonable, under the terms of the Original Grant, which contained no such restriction?”

After discussing the provisions of the various acts,

including the Act of Congress of July 1, 1862, (12 Stat., pp. 489-492), the opinion proceeds;

“We now come to the Act of April 10th, 1869, and must read it not only in view of the Act of 1866, but in the ‘light of surrounding circumstances.’ We must, therefore, remember that at the time of the passage of the Act of 1866, there was no Company in Oregon, selected by Congress, as the recipient of the powers and privileges conferred. That matter was referred to the sovereign State of Oregon. The Legislature of that State was left to designate a Company. No such designation was made until October 20th, 1868. The Legislature could hardly be charged with neglect. On the contrary, the delay must be attributed to a due regard to the public interests. The Company designated, could be guilty of no neglect, because it could not act until designated. Congress might withdraw its bounty, or change its policy, doubtless, but unless it very clearly indicated that intention, a waiver as to mere points of time, would be assumed, where a Company had acted with all due celerity after its designation. The Federal Government, consistently with comity and public policy, could not treat a Sovereign State with disrespect, and therefore would not inflict a penalty on the corporation, because of delay in the action of the State itself.

“The Act of 1869 gives the Company that had been designated by the Legislature of Oregon, the right to file its assent within one year after the Act of 1869, and gives to that filing the same force and effect, to all intents and purposes, as if such assent

had been filed within one year after the passage of said Act of 1866. *

“There could have been no motive on the part of the Government, to put the Oregon Company in a less favorable position than the California Company, for the latter, on reaching the State line, could have gone on, under the Act of 1866, with the consent of the Oregon Legislature, and completed the line of road to Portland. The same inducements on the part of the Government to give its aid in 1866, still existed in 1869. The act of 1869, was, therefore, curative in its nature, and waived the literal performance of the acts called for by the Statute of 1866.

“Is it not then clear, that the Act of 1869 was not intended to create any radical change in the Act of 1866? Its primary, and it may be said, only object, was to give to the subsequent filing, of the assent of the Corporation, in the Department of the Interior, the ‘same force and effect, to all intents and purposes, as if such assent had been filed within one year after the passage of said Act’ of 1866.” * *

“If it means that “actual settlers only” can become purchasers from the Company, and that all the lands, far and near, whether at stations, new towns, or important commercial points, are limited to two dollars and a half per acre, then it not only is directly contrary to the whole scope and bearing of the Act of 1866, but repeals by implication, a great part of that Act. All this is done, if at all, not by the plain language of the body of the enactment, but by

the obscure words of a second proviso.” * * * *

“The object is still ‘to aid in the construction of the Railroad, etc.’ The mandate still remains that ‘the land hereby granted shall be applied to the building of said road,’ etc. The word ‘assigns’ is still annexed to the word ‘Company.’ The great benefit the Government is to have, as secured by Sections 2 and 5, still remains intact. But if the last proviso to the Act of 1869 is to be read literally most of those provisions of the Act of 1866 would be repealed by implication. The Company could no longer sell to the highest bidder, any of its vast acres, could have no auction sale, could not speedily realize, but must await the slow and tedious progress of immigration to an agricultural State. At least a quarter of a century would pass away, yet short and positive is the time within which the road is to be completed and equipped.

“The Secretary of the Interior too, withdraws the Railroad lands from public sale and settlement, as provided in Section 2 of the Act of 1866, and thereafter no bona fide settlement could be made on these lands. The Company could not even mortgage the lands, because a mortgage always contemplates the possibility of a foreclosure, or other enforced payment, in the ordinary way of judicial sentence, with the right of purchase by the creditors. Yet if none could purchase but settlers, and they only to the extent of 160 acres, each, and that too at two dollars and fifty cents per acre, a mortgage is practically and in fact, absolutely prohibited. Such absurd re-

sults could never have been contemplated by Congress; certainly not as the effect of a mere proviso to an amendatory or supplemental Act. * * *

“Looking, then, at the Act of April 10th, 1869, and we find that although the Company designated by the Legislature of Oregon, is given one year after April 10th, 1869, within which to file its assent in the Department of the Interior, yet that Act relates back, and has the same effect as if filed before the 25th July, 1867. Being therefore retroactive, Congress was cautious to prevent a wrong being inflicted upon persons whose rights, had intervened during this time. The first proviso distinctly reserves the intervening rights of Railroad Companies under the Act of 1866, and provides (what was intended by the original Act) that only one Oregon Company should have a grant of lands under those Acts.

“The second proviso carries out the same principle. During the long lapse from July 25th, 1866, the date of the first Act, and April 10th, 1869, the passage of the last Act—settlers had gone in upon portions of these lands, and made their homes, though they had not yet purchased, or pre-empted, or complied with the homestead laws. They were, however, ‘actual settlers,’ and might have become, in the process of time (had not the Act of 1869 been passed), entitled to pre-emption or homestead rights. Up to April 10th, 1869 no Oregon Company had acquired any right under the Act of 1866; consequently the Secretary of the Interior had not withdrawn, under the Act, the land from market, or settlement. The Act of 1869 operating then retrospectively, these ‘actual

settlers' were affected, and consequently were intended to be protected by the last proviso of that Act. Rejecting the single word 'only,' and that proviso becomes plain, viz: 'And provided, further, That the lands granted by the Act aforesaid shall be sold to actual settlers, in quantities not greater than one quarter section to one purchaser, and for a price not exceeding two dollars and fifty cents per acre.' This would mean 'actual settlers,' at the date of the Act of 1869—or possibly up to the time of the location of the road, after the passage of the Act of 1869.

"The difficulty arises entirely from the use of the word 'only.' But the proviso may, by a slight transposition, give force even to that word; thus making it, that in the case of actual settlers, and in their cases 'only,' the Company would be compelled to let them have a quarter section each, at two dollars and a half per acre. This construction is rational and practical, retains all that is useful, in the original Act, aids the Railroad Company, and yet does justice to the 'actual settler,' who was on the land when the Act of 1869 was passed. * * * *

"In thus construing the Act of 1869, it is made to perform only a similar to that of the proviso in Section 2 of the Act of 1866. That Section after declaring that the 'land which shall remain in the United States, within the limits of the aforesaid grant, shall not be sold for less than double the minimum price of public land, when sold,' goes on to protect by the proviso 'bona fide and actual settlers' under the pre-emption laws of the United States, giving the right to purchase, at the price fixed at the

date of their settlements, and also to protect settlers under the homestead laws, to the extent of eighty acres of the land reserved to the United States.

“The manifest intention of the last proviso, to the Act of 1869 is likewise to protect the ‘actual settler’ who is deemed to have a claim on the equity and conscience of the Government.

“I am satisfied from the whole scope of both Acts of Congress, and by applying the recognized rules of construction, that the meaning of the proviso of the Act of 1869 is what I have given above, and that the power of the Company to sell is unlimited, as to persons and price, except that actual settlers on the lands on the 10th April, 1869, and possibly up to the time of the location of the line of the Railroad, have the right to purchase one quarter section each at two dollars and fifty cents per acre.”

“Government’s Exhibit No. 109-D” is a certified copy of the letter of Commissioner Drummond of July 16, 1872, addressed to Attorney General Williams in his official capacity (Vol. X, pp. 5370-5373, Record) in reply to a letter of June 27, 1872, written by Attorney General Williams to the Commissioner. This letter last mentioned is not in the record, and it appears that after diligent search had been made therefor, it could not be found. The contents of that letter can be inferred, however, from the statement made by Mr. Drummond, in his letter mentioned, wherein he says:

“It is stated in your letter that the papers contain no communication to me or to the Secretary of the Interior, asking any action or decision in reference

to the subject which they discussed. That they were not filed with the view of eliciting any opinion, and that you did not suppose any would be given until some questions were presented which it would be necessary for the Department to decide, etc. You, therefore, ask that the papers may be filed until some question arises, or the parties bring them before me for consideration, or ask for opinion upon the question which they present, and that the opinion which the Secretary has given upon the subject may be withdrawn until some question is raised, making it necessary to pass upon the construction of the Act mentioned, or until the parties interested desire an opinion on the subject. * * * It was not understood that you desired the opinion, but the letter was addressed to you because I viewed you as the medium of communication adopted by the Company. Your request for a recall of the opinion expressed was presented to the Secretary who desires me to state that while he must respectfully decline to formally withdraw his opinion, yet, in view of your letter, he will be willing at any time, on application, to reopen the case and to have all arguments the Company may desire to present upon the matter."

On May 7, 1870, the Secretary of the Interior J. D. Cox, wrote a letter to Jos. S. Wilson, Commissioner of the General Land Office, in which he says:

"Evidence has been filed in this Department by Geo. E. Cole, Esq., Secretary of the Oregon Central Railroad Company, of Salem, Oregon, that said company have sold and transferred all their rights, interests, etc., to the California and Oregon (mean-

ing Oregon and California) Railroad Company, of Portland, Oregon.”

On May 23, 1870, Jos. S. Wilson, Commissioner of the General Land Office, wrote a letter to Hon. Geo. H. Williams, United States Senate, as follows:

“Pursuant to your oral request of this morning, I have the honor to state, that evidence is on file to the effect that the ‘Oregon Central Railroad Company,’ of Salem, Oregon, have sold and transferred all their rights, interests, etc., to the California and Oregon (meaning Oregon and California) Railroad Company of Portland, Oregon, and we have this day dispatched such information to the Register and Receiver at Oregon City, Oregon, and to be governed accordingly in relation to the matter.”

On May 23, 1870, Jos. S. Wilson, as Commissioner of the General Land Office, wrote a letter to the Register and Receiver, Oregon City, Oregon, in which he says:

“I have been advised by the Secretary of the Interior to the effect that the Oregon Central Railroad Company of Salem, Oregon, have sold and transferred all the rights, interests, etc., to the California and Oregon (meaning Oregon and California) Railroad Company of Portland, Oregon, and you will be pleased to govern yourself accordingly in relation to the matter.”

On May 20, 1872, Willis Drummond, Commissioner of the General Land Office, wrote a letter to Hon. C. Delano, Secretary of the Interior, in which he said:

“I have the honor to lay before you certain papers

filed in this office by the Hon. Geo. H. Williams, Attorney General for the purpose of obtaining a construction by the Department of the proviso of the Act of Congress approved April 10th, 1869, Stat. 16, p. 47—amendatory to the Act of July 25th, 1866, Stat. Vol. 14, p. 239—granting lands to aid in the construction of a Railroad and Telegraph Line from the Central Pacific Railroad in California to Portland in Oregon, which reads as follows: ‘That the lands granted by the Act aforesaid shall be sold to actual settlers only in quantities not greater than one quarter section to one purchaser, and for a price not exceeding two dollars and fifty cents per acre.’

“As the Company requests an expression of opinion by the Department, the papers are hereby submitted.”

(“Defendants’ Exhibit 373,” Vol. XIV, pp. 7371–7375, Record.)

From “Defendants’ Exhibit 374 (Vol. XIV, pp. 7376–7383, Record), it appears that form of deeds to be executed by the European and Oregon Land Company and Milton S. Latham, Faxon D. Atherton and William Norris, Trustees, under the Trust Deed of April 15, 1870, executed by the Oregon and California Railroad Company to them, which form of deed recites this trust deed, and also recites that the Trustees had on March 28th, 1871, executed to the European & Oregon Land Company a certain Indenture (to which that Company and Oregon and California Railroad Company were parties, accepting and ratifying the same) which was recorded in the offices of the County Clerks of Multnomah,

Clackamas, Marion, Linn and Douglas Counties, in the State of Oregon, and whereby for the uses and purposes in said Indenture set forth, the said Trustees conveyed to the said Land Company, among others, the lands described—was sent to the Department of the Interior by I. R. Moores, Land Agent, of the Oregon and California Railroad Company, about January 23, 1874, or prior thereto, and therewith Mr. Moore, as Land Agent of the Oregon and California Railroad Company transmitted a letter to Commissioner Drummond on January 23, 1874, which reads:

“Your letter of the 13th ult., addressed to Mr. Holladay, Prest. O. and C. R. R. Co. with Copy of letter enclosed, relating to certain tracts of land for which Patents had been issued to the Company and which were subsequently ascertained to be embraced in valid claims, and requesting Mr. Holladay to execute a quit claim Deed to the rightful owners of such lands, has been referred to me with instructions to inform you, that all the lands enuring to the Company by the terms of the Act of July 25, 1866, have been disposed of to the European and Oregon Land Company, a corporation organized under the Laws of California, with its principal office in San Francisco, subject to a mortgage to three Trustees to secure the payment of the bonded debt of the Board. To give clear title to the lands and free it from the mortgage lien, it is necessary to obtain title from the E. and O. Land Co. in which conveyance the Trustees join. One of the Trustees is now in Europe, but will return within the next sixty days,

when the deeds will be duly executed as requested. The claimants here have been notified of the condition of facts as stated above. I enclose one of our blanks which will fully explain the situation."

On March 13, 1874, Commissioner Drummond wrote a letter to I. R. Moores, Land Agent of the Oregon and California Railroad Company, in which he said:

"The Register and Receiver at Oregon City, have recently filed James Waldrup's Donation Certificate No. 4325, covering lots 2 and 3 of Section 13, Tp. 3 S., R. 3 E., 42.21/100 acres, settlement March 15th, 1854.

"It is shown that the above lots were selected under the Act of July 25, 1866, and inadvertently patented May 9th, 1871, to the 'Oregon and California' Railroad Company.

"I therefore respectfully request a relinquishment of said lots on the part of said Railroad Company, in order that Mr. Waldrup's certificate may pass for patenting.

"The receipt of your letter of 23d January last is acknowledged, stating that as soon as the return of one of the Trustees of your Company from Europe, the Company would execute 'quit claim' deeds for the tract requested by my letter of 22d April last.

"I have also to add that the printed form of 'quit claim' deed in use by the European and Oregon Land Company, and which accompanied your letter of 23d January, will be satisfactory to this office."

It also appears from "Defendants' Exhibit 375" (Vol. XIV, pp. 7383-7439) that P. Schulze, Land

Agent of the Oregon and California Railroad Company, in his letter of June 20, 1876, addressed to the Commissioner of the General Land Office, in reply to the letter of the latter of June 3rd, advised the Commissioner that "delay in execution of relinquishment is caused by severe illness of one of our trustees, who has thus far been unable to sign deed. "Hope to get the deed next week."

On July 14, 1876, Commissioner J. A. Williamson wrote P. Schulze, Land Agent of the Oregon and California Railroad Company, as follows:

"I have to acknowledge the receipt of your letter of 28th ultimo, and seven accompanying 'quit claim' deeds executed the 22nd ultimo, by the Oregon & California Railroad Company in compliance with our letter of April 22d, 1873, for the following described tract, inadvertently patented May 29th, 1872, to said Company (Descriptions follow)."

On June 28th, 1876, P. Schulze, Land Agent, Oregon and California Railroad Company, wrote to the Commissioner of the General Land Office as follows:

"I have the honor, herewith, to transmit to you quit claim deeds, numbered 146, 147, 148, 149, 150, 151 and 153, for certain tracts which were inadvertently patented to this company.

"I do not send a deed for Lots 2 and 3, Sec. 13, T. 3 S. R. 3 East, as requested in your letter of March 13th, 1874, because we have sold one of said tracts, not knowing that they were covered by a Donation Entry. It will take some time before this matter can be straightened up,

"Please acknowledge receipt of the above deed.

The deeds therewith enclosed recited that the lands therein described were theretofore patented by the United States to the Oregon and California Railroad Company, and were embraced in a certain Trust Deed of that Company to Milton S. Latham, Faxon D. Atherton and William Norris, Trustees, of date April 15, 1870, and purported to be signed by Milton S. Latham, Faxon D. Atherton and William Norris, and by no other person.

On July 9, 1877, P. Schulze wrote having thereon above the date, the words "Land Department, Oregon and California R. R. Co." to the Commissioner of the General Land Office, as follows:

"Referring to your letter of June 19th I beg to state that this company is going to furnish a quit claim deed for the tracts described in the said letter.

"There will, however, be some delay in the execution of the deed, owing to the protracted illness of one of the mortgage trustees who have to execute the deed."

One June 19, 1877, Commissioner of the General Land Office Williamson, wrote a letter to P. Schulze, Land Agent, Oregon and California Railroad Company, requesting the Company to furnish a full relinquishment to the United States of certain lands described in patent No. 1, issued May 9, 1871, to the Oregon and California Railroad Company.

On April 27, 1877, Commissioner of the General Land Office Williamson, wrote a letter to P. Schulze, Land Agent, Oregon and California Railroad Company, requesting his Company to furnish relinquishment of a certain tract of land described in Patent

No. 2, issued July 12, 1871, to the Oregon and California Railroad Company.

On April 30, 1877, Commissioner of the General Land Office J. A. Williamson, wrote a letter to P. Schulze, Land Agent, Oregon and California Railroad Company, requesting the Company to furnish a relinquishment of certain premises described in Patent No. 2, issued July 10th (12th), 1871, to the Oregon and California Railroad Company.

On August 10th, 1877, P. Schulze, Land Agent, Oregon & California R. R. Co., wrote to the Commissioner of the General Land Office as follows:

“Your letters of April 27th and April 30th were mislaid and therefore left unanswered, having just found them, I beg to state that quit claim deed to the United States for the tracts described in the said letters will be issued as soon as a mortgage trustee will have been appointed by the Court in place of F. D. Atherton, deceased.”

On August 10, 1877, P. Schulze, Land Agent, wrote a letter to the Commissioner of the General Land Office as follows:

“I have the honor to enclose herewith as quit claim deed for Lots 2 and 3 of Sec. 13, T. 3 S. R. 3 E. containing 40.21 acres, to James Waldrup, the receipt of which please acknowledge.”

On Sept. 5, 1877, Commissioner of the General Land Office Williamson, wrote to P. Schulze, Land Agent, Oregon and California R. R. Co., as follows:

“I have to acknowledge receipt of your letter of 10th ulto., and accompany quit claim deed for Lots No. 2 and 3 of Sec. 13, Tp. 3 S. R. 3 E., 42.21/100

acres, made by the Oregon and California Railroad Company, June 22d, 1876, in accordance with our letter of March 13, 1873."

This deed therein referred to, was executed by Milton S. Latham, Faxon D. Atherton and Wm. Norris, and recites that the lands described had been theretofore patented by the United States to the Oregon and California Railroad Company, and were embraced in a certain Trust Deed of said Company to Milton S. Latham, Faxon D. Atherton and William Norris of date April 15, 1870.

On Sept. 6, 1877, Commissioner of the General Land Office Williamson, wrote a letter to the Register and Receiver, Oregon City, Oregon, as follows:

"The selection of Lots 2 and 3 of Sec. 13, Tp. 3 S. R. 3 E., 42.21 acres, by the Oregon and California Railroad Company, under the Acts of July 25, 1866, and June 25, 1868, and same patented May 9, 1871, I have now to state were duly relinquished by said Company, June 22d, 1876, upon the showing that said selection was in direct conflict with the donation claim of James Waldrup, Certificate No. 4325, issued Jany. 28, 1874.

"Please note on your records said relinquishment and refer to this as letter F."

On January 28, 1878, P. Schulze, Land Agent, O. & C. R. R. Co., wrote a letter to the Commissioner of the General Land Office, as follows:

"Referring to your letters 'F' dated April 27th, April 30th and June 19th, 1877, respectively I beg to enclose herewith our relinquishment to the following described land, to-wit:

“S. W. 4 Sec. 7 T. 1 S. R. 4 E.; Lot No. 5 of Sec. 29 T. 9 S. R. 3 W.; Lots 1 2 3 and 4 Sec. 31 T. 6 S. R. 5 W.; and S 2 of N. W. 4 of N. W. 4 Sec. 3 T. 6 S. R. 1 W.

“Please acknowledge receipt.”

On February 16, 1878, Commissioner of the General Land Office J. A. Williamson, wrote a letter to P. Schulze, Land Agent, Oregon & California R. R. Co., as follows:

“I have to acknowledge the receipt of your letter of 28th ultimo, and accompanying relinquishment of the Oregon and California Railroad Company, made the 19th ulto., in accordance with my letters of April 27 and 30th and Jun 19, 1877, for the following described tracts:

“S. W. $\frac{1}{4}$ Sec. 7, Tp. 1 S. R.—4 E, 160.20 acres.

“S. $\frac{1}{2}$ of N. W. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ Sec 3, Tp. 6, S. R. 1 W., 19.45 acres.

Lots 1, 2, 3 and 4, Sec. 31, Tp. 6, S. R. 5 W., 68.44 acres.

“Lot 5, Sec. 29, Tp. 9, S. R. 3 W., 5080 acres.”

The relinquishment enclosed in the letter of Mr. Schulze to the Commissioner on January 28, 1878, is in the form of a deed, signed by Milton S. Latham and Wm. Norris, duly executed and acknowledged, which recites that the lands described therein were patented by the United States to the Oregon and California Railroad Company under the Act of Congress of July 25, 1866, and were parts of the land conveyed by that Company to Milton S. Latham, Faxon D. Atherton and William Norris, Trustees, by a certain Trust Deed of date April 15, 1870, and that

Milton S. Latham and William Norris were the only surviving and acting Trustees thereunder, and that Faxon D. Atherton had died July 18, 1877, and the deed purports to release and forever quitclaim to the United States the premises described.

On August 4, 1881, Commissioner of the General Land Office N. C. M'Farland, wrote a letter to P. Schulze, Atty., Oregon and California R. R. Co., requesting the Railroad Company to reconvey title to certain lands to the United States which had been patented on May 29, 1872, List No. 3.

On August 25, 1881, Paul Schulze, Land Agent, Oregon and California Railroad Company, replied to the letter of the Commissioner of the General Land Office of August 4, 1881, as follows:

"Referring to your letter 'F' of 4th inst., I have the honor to advise you that this company will comply with your request to give a quitclaim deed to the United States for the N. W. 4 of the N. W. 4 of Section 33, Township 18 South Range 4 West.

"There will be, however, some delay in the issuance of such deed as it will require some time to obtain the signatures of the mortgage trustees of this company."

On June 11, 1887, Geo. H. Andrews, upon a letter having these words "Oregon & California Railroad Company, R. Koehler, Receiver," wrote to the Commissioner of the General Land Office, enclosing therewith a deed of the Company to certain tracts of land, the two first pieces of which were included in patent dated May 29, 1872, and the last in patent dated July 12, 1871, to which on July 2, 1887, Comis-

sioner of the General Land Office Wm. A. J. Sparks, replied to Geo. H. Andrews acknowledging the receipt of his letter of June 11, 1887, and the accompanying deed, which deed recites that patents had been erroneously issued for the premises described, by the United States to the Oregon and California Railroad Company, under the Act of Congress of July 25, 1866, granting lands to said Company to aid in the construction of its railroad and telegraph line therein mentioned, and further recites that "the said Oregon and California Railroad Company doth hereby grant and convey, and the Farmers Loan and Trust Company, a corporation created and existing under the laws of the State of New York, being the Trustee or Mortgagee of said lands, so granted to said Railroad Company by said Act of Congress, doth hereby remise and release unto the United States, etc." This deed was executed May 9, 1887, by the Oregon and California Railroad Company by Geo. H. Andrews, Second Vice-President, by W. W. Bretherton, Secretary, by the Farmers Loan and Trust Company by R. G. Rolston, President, and by Wm. H. Leupp, Secretary, duly witnessed, acknowledged and certified, and contains endorsed thereon the following:

"Pursuant to an order of the Circuit Court of the United States for the District of Oregon, bearing date February 9th, 1885, in the case of Lawrence Harrison et al vs. the Oregon and California Railroad Company et al, of record in said Court and cause; I do hereby approve the execution of the

within deed as and upon the considerations and terms therein expressed.

Witness my hand and seal this 8th day of June, A. D. 1887.

“R. KOEHLER,
Receiver.”

On October 21, 1887, A. C. Jones, Receiver, of the United States Land Office at Roseburg, Oregon, wrote a letter to the Hon. Commissioner of the General Land Office, Washington, D. C., as follows:

“Referring to your letter ‘F’ dated July 2, 1887, I herewith return to you the deed therein referred to, the same having been recorded in all the counties in which the land is situated (Linn and Lane), and being returned to this office by the Register and Receiver of Oregon City Land Office.”

The deed therewith returned is a certified copy of the deed just mentioned, certified by the Commissioner of the General Land Office Wm. A. J. Sparks, as follows:

“Department of the Interior,
General Land Office,
Washington, D. C., June —, 1887.

“I, Wm. A. J. Sparks, Commissioner of the General Land Office, hereby certify that the annexed copy of a deed executed by the Oregon and California Railroad Company, and the Farmer’s Loan and Trust Company, a corporation existing under the laws of the State of New York, on the 9th day of May, 1887, and reconveying to the United States, the N. W. $\frac{1}{4}$ Sec. 33, Tp. 18 S. 1, Range 4 W. 1, and the N. W. $\frac{1}{4}$ S. E. $\frac{1}{4}$ and N. E. $\frac{1}{4}$, S. W. $\frac{1}{4}$ Sec. 29,

Town. 14 S. Range 1 E., Roseburg district; and the S. E. $\frac{1}{4}$, N. W. $\frac{1}{4}$ Section Town. 11 S. Range 1 E., Oregon City district, all in the State of Oregon, is a true and literal exemplification from the files of this office.

“In witness whereof I have hereunto subscribed my name, and caused the Seal of this office to be affixed, at the City of Washington, on the day and year above written.

WM. A. J. SPARKS,
Commissioner of General Land Office.”

On October 19, 1905, D. A. Chambers, Attorney, Oregon and California Railroad Company, wrote a letter to the Commissioner of the General Land Office as follows:

“Referring to your letter (1904-222494) to me of February 6, 1905, I now enclose herewith Deed No. 88-B, dated August 1, 1905, executed by the Oregon and California R. R. Co., by J. P. O'Brien, Vice-President, and W. W. Cotton, Secretary, and by the Union Trust Company of New York, by A. W. Kelley, Vice-President, and E. R. Merritt, Assistant Secretary, relinquishing and reconveying the tracts named in the caption to the United States.

“Please acknowledge receipt of this deed.”

On May 9, 1871 (Vol. XIV, pp. 7455-7457, Record), the Attorney General replied to Secretary Delano that he concurred in the opinion of Assistant Attorney General Smith that the transfer of the rights of the East Side Company to the Oregon and California Railroad Company was valid, as evi-

denced by the deed filed in the Department April 28, 1870, and that patents for the lands opposite to and coterminous with the three sections of twenty miles each of constructed road should be issued to the Oregon and California Railroad Company.

On April 20, 1871, (Defendants' Exhibit 378, Vol. XIV, pp. 7463-7502, Record) Jos. S. Wilson, President, European & Oregon Land Company, wrote a letter to the Commissioner of the General Land Office, enclosing therewith a letter of that date from I. R. Moores, Land Agent of the Oregon & California Railroad Company, referring to Lists Nos. 1 and 2 on file in the Department embracing 33,308.97/100 acres, selected as inuring to the Oregon and California Railroad Company under the Act of July 25, 1866, and earnestly asking for the early issuance of the patents.

In the letter of I. R. Moores it is stated that on July 28, 1870, as Agent of the Company, he made selections of lands for the first completed section of twenty miles of road embraced in the lists mentioned, covering the area mentioned, but that no patent had been received and in consequence thereof the Company could not sell the lands.

On May 9, 1871, Acting Commissioner W. W. Curtis replied to the letter of April 20th, 1871, advising that he had that day transmitted to I. R. Moores, Land Agent, Patent No. 1 of lands inuring to the Company under the Act of Congress of July 25, 1866, embracing in the aggregate 32,517.21 acres.

On March 25, 1871, Jos. S. Wilson wrote to the Commissioner of the General Land Office calling his

attention to section 2 of the Act of July 25, 1866, and requesting a sketch map showing the first sixty continuous miles according to the map of survey which had been filed, and also asking for certain other information.

On March 21, 1871, Mr. Jos. S. Wilson again wrote to the Commissioner of the General Land Office requesting certain information and early action upon the matters requested.

On April 7, 1871, Willis Drummond, Commissioner of the General Land Office, acknowledged receipt of these letters and advised that he would furnish the requested data touching the Oregon and California Railroad Company at an early date.

On April 19, 1871, Willis Drummond, Commissioner of the General Land Office, wrote to Jos. S. Wilson President of the Oregon and California Land Company (meaning, no doubt, the European and Oregon Land Company) in reply to the letters of Mr. Wilson of March 21st and 23rd, and furnished certain data requested respecting "the grant by Congress of 25th July, 1866, for the Oregon and California Railroad Company of Oregon."

On April 3, 1871, Jos. S. Wilson wrote to the Commissioner of the General Land Office requesting certain information and therewith called special attention to certain matters affecting the grant.

On April 21, 1871, Commissioner Drummond wrote a letter to Jos. S. Wilson, President Oregon and California Land Company (meaning European and Oregon Land Company, no doubt), acknowledging receipt of the letter of April 3rd transmitting certain

circulars requested, and advising that requisite data would be ascertained and given in further communications.

On May 17, 1871, Jos. S. Wilson wired to the Commissioner of the General Land Office requesting that he telegraph when railroad patent mentioned in the letter of the Commissioner of April 19th could be expected, and also as to Lists 3, 4, 5, 6, 7, to which Acting Commissioner W. W. Curtis replied by wire May 18, 1871, addressed to Jos. S. Wilson, 320 California Street, San Francisco, Cal., advising that Railroad Patent No. 1 was transmitted May ninth to I. R. Moores, Salem, Oregon, and that Lists three to seven inclusive, were just received.

On May 12, 1871, Jos. S. Wilson wrote to the Commissioner of the General Land Office, advising that these lists had been sent, that Lists Nos. 1 and 2 had been approved, and requesting that these five lists be examined and carried to patent at an early period.

On June 1, 1871, Commissioner Drummond wrote to Mr. Wilson acknowledging the receipt of his letter of May 12th and advising that Lists Nos. 3, 4, 5, 6 and 7 of the Oregon and California Railroad selections in the Oregon City District under the Act of July 25, 1866, and embracing in the aggregate 141,537.76 acres, had been received and that they would be designated upon the records, examined and listed for approval at the earliest practicable period.

On July 18, 1871, Joseph S. Wilson wired the Commissioner of the General Land Office, inquiring when Oregon and California patent No. 2 might be expected, to which Commissioner Drummond replied

July 19, 1871, by wire that the patent would be ready for transmission on July 22nd. On September 29, 1871, Joseph S. Wilson wrote to the Commissioner of the General Land Office, upon stationery carrying the words "Office of European & Oregon Land Company," referring to patent No. 2 in favor of the Oregon and California Railroad Company, transmitted to I. R. Moores July 22, 1871, from the General Land Office, calling attention to certain lands therein described and making further inquiry in reference to same. On November 18, 1871, Joseph S. Wilson wired Commissioner of the General Land Office, requesting that he suspend action on large list of Oregon selections or railroad lands from Roseburg to California line, receipt of which was acknowledged by Commissioner Drummond on November 21, 1871. Joseph S. Wilson, on November 18, 1871, wrote Commissioner of General Land Office, advising that on that date he had received a letter from I. R. Moores, of the Oregon and California Railroad land department, dated November 13, 1871, referring to the fact that a preliminary survey had been made more than a year ago for a short distance south from Roseburg, and enclosing therewith a map believed to be approximately correct. Mr. Wilson presented his objections to this and requested an acknowledgment of the receipt of his letter; to which, on January 4, 1872, Commissioner Drummond replied, acknowledging receipt thereof, and advising that official action would be suspended as requested. On January 9, 1872, Joseph S. Wilson, as President, on stationery having the words "Office European and

Oregon Land Company," wrote the Commissioner of the General Land Office, advising that he had received a letter dated December 26, 1871, from I. R. Moores, agent of the Oregon and California Railroad Company, advising that a map in good shape had been transmitted to the department, showing the definite location of the railroad from Township 30 south to the California line, and Mr. Wilson requested that immediate orders might be given for the withdrawal of the lands affected, copies thereof forwarded to him, and that a copy of the sketch map be sent to the Register and Receiver as the guide and basis of withdrawal. He requested prompt acknowledgment and compliance with his request. On October 26, 1871, a like letter, upon like stationery, signed as President, was written by Joseph S. Wilson to Commissioner of the General Land Office, advising that on October 21, 1871, he had received from I. R. Moores lists of selections of lands in the Roseburg district, inuring to the Oregon and California Railroad Company under the Act of Congress approved July 25, 1866, which had been transmitted about October 1, 1871, by the Register of the Land Office at Roseburg to the General Land Office, which lists embraced 262,030.8 acres. Mr. Wilson advised that these lists were accurately prepared, and requested early action of the Land Department "in view of the enormous outlays required in constructing this railway to span Western Oregon from north to south." On January 25, 1872, Commissioner Drummond wrote Joseph S. Wilson, acknowledging receipt of the "Oregon and California Railroad lists

of selections in Oregon," referred to in the letters of Mr. Wilson on October 26 and December 30, 1871, and advising that these lists were duly received October 7, 1871, and had been designated upon the tract books of his office. The Commissioner further stated that lists 1 and 2 embraced 262,038.8 acres, and were lands lying south and beyond the constructed fourth section of twenty miles of road, and would have to await the filing of advanced constructed sections of road before any steps could be taken toward the patenting thereof. On December 30, 1871, Joseph S. Wilson, as President, upon like stationery, wrote to the Commissioner of the General Land Office, advising that he had on October 26, 1871, written to the Commissioner referring to certain lists of selections, and advising that great care had been observed in preparing same and requesting prompt official action and reply to his letter. A like letter was written by Joseph S. Wilson, as president, on like stationery, January 17, 1872, acknowledging receipt of letter from the Commissioner January 4, 1872, which acknowledged receipt of his letter of November 13, 1871, relative to preliminary map of the route of the Company from near Roseburg to the California line. This letter makes further explanation of this map and of the correspondence between the parties, and requests compliance both as to the issue of the order of withdrawal and cancellation of the invalid, interfering sections. On February 20, 1872, Joseph S. Wilson, as president of the European & Oregon Land Company, wired Commissioner Drummond, inquiring if Oregon and Califor-

nia Railroad map had been received and withdrawal order made; to which Commissioner Drummond, on February 24, 1872, replied by wire, advising that map had been received and was under consideration. On February 24, 1872, Joseph S. Wilson, president of the European & Oregon Land Company, as such wrote the Commissioner of the General Land Office, acknowledging receipt of his letter of January 25, 1872, which acknowledged receipt of letter of October 17, 1871, with reference to selection lists Roseburg land office, the subject of previous correspondence. In this letter Mr. Wilson says:

“What is now wanted, however, and to which there is no legal interdict, is that the Lists shall be taken up, examined and tested and where the selections are found perfectly regular, and correct, and free from interference, that the usual List of approval may be furnished. At the same time it would be gratification to the Company to have transcript of the approved List, so as to be certain as to the particular lands inuring under the Grant, on which they can rely as a land fund, and for which ultimate title as stipulated in said 4th section is to be given by patent, upon meeting the statutory requirements aforesaid.”

This correspondence hereinabove set out, is all contained in Defendants' Exhibit 378 (Vol. XIV, pages 7463-7502, Record).

In his letter of May 12, 1871, from Jos. S. Wilson, President of the European & Oregon Land Company to the Commissioner of the General Land Office, the following appears:

“The heavy expenses incurred in realizing the purpose of Congress in regard to the construction of the railway and telegraph at so distant a point made it a serious concern to the grantees to have the patents so as to make the means available that are allowed by the statute which can only be done after the issuing of the patents.” (Vol. XIV, p. 7483.)

In his letter of December 30, 1871, Mr. Wilson wrote the Commissioner of the General Land Office as follows:

“As I have received no intimation as to what has been done, nor acknowledgment, and as the early approval of the lists is a matter of grave and most pressing importance to the Company in view of very heavy outlays, and the necessity for making immediately available the lands which have been granted, I am constrained again to trouble the Commissioner by asking that the work be pressed to completion, and the requisite list of approval forwarded at the earliest period possible, thereby rendering legitimate service to the Company, and obliging the undersigned.” (Vol. XIV, p. 7497, Record.)

It appears that patents to the Oregon and California Railroad Company issued under the Act of July 25, 1866, and amendments thereof, and the Act of May 4, 1870, are listed in the Record (Vol. XIV, p. 7514-7564), beginning with Patent No. 1, issued May 9, 1871, for 32,517.21 acres, reciting in the patent the Acts of July 25, 1866, and June 25, 1868, and issuance of Patent No. 2, July 12, 1871, for 72,417.65 acres within place limits and 47,829.80 acres within indemnity limits, the patent reciting issuance of same

under the Acts of July 25, 1866, and June 25, 1868, showing a total acreage included in these patents issued under these two acts of Congress, of 152,764.67 acres, and with no mention of the Act of April 10, 1869. Patents Nos. 3, 4, 5, 6, 7 and 8, dated from May 29, 1872, down to and including March 3, 1893, conveying 462,800.91 acres, conveyed under the Acts of July 25, 1866, June 25, 1868, and April 10, 1869. Patents Nos. 9 to 211, from June 11, 1894, down to December 7, 1906, were issued, reciting that each was issued under the Act of July 25, 1866, only, and conveying lands therein described within primary limits, amounting to 1,559,120.28 acres, and within indemnity limits 590,419.50 acres, or a total of 2,149,539.78 acres, and a grand total of 2,765,948.85 acres patented. Patents issued under the Act of May 4, 1870, were begun to be issued October 9, 1895, and extended to March 20, 1903, covering a total acreage of 128,618.13 acres.

It appears from "Defendants' Exhibit 383" (Vol. XIV, p. 7564, Record) and "Exhibit 14 to Stipulation" (Vol. IV, pp. 1717-1720) that construction of the first section of the East Side railroad was completed December 24, 1869, examined by Commissioners appointed therefor favorably reported December 31, 1869; such reports submitted by the Secretary of the Interior January 26, 1870, to the President of the United States, and its acceptance recommended, and such recommendations approved by the President January 29, 1870, and thereafter the construction of each subsequent section of road was completed, including the twelfth section, reports of Commissioners

transmitted to the Secretary of the Interior, and by him to the President of the United States, with recommendations that each section of road be accepted, and approval of such recommendations by the President, down to November 8, 1889; and that the first section of the West Side railroad was completed, and the report of the Commissioner, of date January 6, 1872, approved, and the section accepted by the Secretary of the Interior February 16, 1872, and the second section reported on by Commissioners on May 3, 1876, and the report approved and the section accepted by the Secretary of the Interior June 3, 1876; and that pursuant to the official action of these various officers, the lands were approved to be patented, and patents were issued in recognition that the companies, respectively, had earned the lands opposite to and coterminous with the constructed sections of road.

It further appears from "Defendants' Exhibit 384" (Vol. XIV, p. 7564) by the affidavit of H. Villard, of date January 8, 1883, that he was President of the Oregon and California Railroad Company, which had succeeded to and become invested with and was at that time possessed of and entitled to all the grants, rights, franchises and privileges conferred by the Act of July 25, 1866, and the Act of May 4, 1870; that there has been already accepted and approved by the United States, as duly constructed under the provisions of these acts, those parts of the Oregon and California Railroad between East Portland and Roseburg, 198 miles in length, and between Portland and St. Joseph and McMinnville, about 50 miles in length, and that in the summer of 1881, and

fully one year before December 1, 1882, the work of duly constructing, completing and equipping the remaining parts of said railroad, as defined in these acts, has been prosecuted by the company continuously, actively and in perfect good faith, at an actual expenditure of large sums of money (several millions of dollars in amount) and in conformity with the will and desire of Congress, as expressed in these acts, that said lines of railroad should be speedily and thoroughly completed; and that, within the time above mentioned substantial progress has been made towards the completion of these lines, inasmuch as at least 45 miles of new road have, within that time, been constructed, completed and equipped in a thorough and first-class manner, and said new mileage was at that time in full operation as part of the railroad system of the company; and at least 20 miles additional to the above were then partially constructed, and further construction was continuing; that by reason of the mountainous nature of the country through which said lines were being constructed, and on account of other natural obstructions, only overcome with the greatest difficulty and labor and at enormous expense, this mileage was all that could be completed, with the utmost diligence, within the time mentioned; that at that time the company was vigorously continuing said construction, in entire good faith; and that it would continue the same without unnecessary delay until its lines were fully completed in the manner specified in the acts above recited.

This affidavit appears to have been filed in the General Land Office on the 15th day of January, 1883.

At the time it was so filed the company had not complied with the Act of July 25, 1866, or of June 25, 1868, as to construction of road within time, and as shown by the reports made by the company under the Act of June 19, 1878, (20 Stat. 169) had made its official reports to Congress showing sales of these lands from June 30, 1879, for the half year ending June 30, 1883, Vol. IV, p. 1590-1598) in which reports the United States was advised that the company, in selling these lands, was in some instances selling them for more than \$2.50 per acre, and that the Secretary of the Interior recommended approval of the lands for patent and the President of the United States caused patents to be issued for the lands opposite to and coterminous with the constructed portions of road, and the company has continuously asserted title to these lands under these patents, has sold and conveyed the same, has mortgaged the same, as shown by the record, without any action being taken by Congress looking to an attempt to forfeit the grant for alleged breach of the so-called condition subsequent claimed to be created by the proviso of April 10, 1869, and the words of Section 4 of the Act of May 4, 1870, until the passage of the Joint Resolution of April 30, 1908, under which this suit is being prosecuted by the United States.

On January 1, 1886, the Oregon road was constructed and in operation from Portland, as hereinbefore shown (Vol. IV., pp. 1717-1720), and there remained only the unconstructed portion of the road from a point one and one-half miles south of Ashland to the boundary line between Oregon and California,

a distance of 24.125 miles.

As we have seen, it appears from the stipulation of the parties, as shown by Exhibit No. 10 to the Joint and Several Answer Vol. II., pp. 1149-1151, Record), that certain suits had been brought by the United States against the Oregon and California Railroad Company in the United States Circuit Court for the District of Oregon, to quiet title to, and cancel patents for, lands of the said company's East Side land grant, in which the pleadings and proofs showed sales in quantities exceeding 160 acres to single purchasers, and at prices exceeding \$2.50 per acre, without objection made by the United States to any such sales because of quantity of land sold to one purchaser, or sale price. The first of these suits referred to was begun February 3, 1892, and the last February 27, 1901. The first suit involved 240 acres of land sold to John A. Hurlburt for \$720, and the issues were finally determined by the Supreme Court of the United States in *United States vs. Oregon and California Railroad Company et al.*, in 176 U. S. 28.

It appears from the testimony, in addition to what has been stipulated, that about 10,000 applications to purchase quarter sections of timber lands belonging to the company at \$2.50 per acre, have been made to the company and refused since the commencement of the first Lafferty suit about that time up to July 30, 1912, and that these applications are made usually in this way: Some person comes into the office of the company with a bunch of applications, anywhere from 5 to 10 up to 50 or 100, and presents one application and tenders the sum of \$400 with it,

and that being rejected, this person follows by presenting another application and tendering the same \$400, and that being rejected the process is gone through with the entire bunch that the party brings in. This party is attorney or agent for the applicant, or at least claims so to be, and in nearly all cases the blanks used by these so-called applicants are printed forms. It appears from the testimony that there were 7,991 applications in the hands of the Land Commissioner of the Company on March 1, 1909, covering 6,168 quarter sections, or in some cases less, and occasionally an 80 acres. When these applications were tabulated on March 1, 1909, there were 4,749 tracts of land, each covered by one application; there were 1,079 tracts, each covered by two applications; 256 tracts, each covered by three applications; 54 tracts, each covered by four applications; 8 tracts, each covered by five applications, and 4 tracts, each covered by six applications. (Vol. IV., pp. 1958-1960, Record.)

The form of patent issued under contract No. 5394, being the third item of Exhibit No. 9 of the Answer, omitting descriptions, is as follows:

“The United States of America.

“To all to whom these presents shall come, Greeting:

“Whereas, by the Acts of Congress approved July 25, 1866, June 25, 1868, and April 10, 1869, to aid in the construction of a railroad and telegraph line from Portland in Oregon, thence southerly through the Willamette, Umpqua and Rogue River valleys to the southern boundary of Oregon. Authority is given to the Oregon and California Railroad Company of

Oregon, a corporation existing under the laws of the state to construct a railroad and telegraph line, under certain conditions and stipulations as expressed in said Acts and provision is made for granting to the said company every alternate section of public land designated by odd numbers, to the amount of ten alternate sections per mile on each side of the said railroad on the line thereof and within the limits of twenty miles on each side of said road, not sold, reserved or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time, the line of said road is definitely fixed.

And Whereas, it is further enacted in said section that when any of said alternate sections or parts of sections shall be found to have been granted, sold, reserved, occupied by homestead settlers, pre-empted or otherwise disposed of, other lands designated as aforesaid shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections designated by odd numbers as aforesaid nearest to, and not more than ten miles beyond the limits of said first named alternate sections.

And Whereas, official statements from the Secretary of the Interior have been filed in the General Land Office, that Commissioners appointed by the President under the provisions of the fourth section of said Act of July 25, 1866, have reported to him that the said Oregon and California Railroad and Telegraph Line commencing at a point in East Portland, in the County of Multnomah, State of Oregon,

and ending at a point on the boundary between the States of Oregon and California, where it joined the California and Oregon Railroad a distance of three hundred and sixty miles has been constructed and fully completed and equipped in the manner prescribed by said Act.

And Whereas, that portion of said road lying between the City of Portland, Oregon, and the town of Roseburg, in Township 27 South, Range 5 West, a distance of one hundred and ninety-seven miles was completed within the time prescribed by the law, and the balance of the road was completed after the expiration of such time. And Whereas certain tracts of land have been selected by the duly authorized agents of the Oregon and California Railroad Company as shown by such agent's original lists of selections approved by the local land officers and now on file in this office. And Whereas said tracts of land lie within the indemnity limits of said grant and are particularly described as follows, to-wit':

(Description omitted.)

The said tracts of land as described in the foregoing make the aggregate area of ninety-seven thousand nine hundred and twenty-nine acres and sixty-seven hundredths of an acre (97,829.67).

Now, Know Ye, that the United States of America in consideration of the premises and pursuant to the said Acts of Congress have given and granted, and by these presents do give and grant unto the said Oregon and California Railroad Company of Oregon, and to its assigns all the tracts of land selected as aforesaid and described in the foregoing, yet exclud-

ing and excepting from the transfer by these presents 'All Mineral Lands' should any such be found to exist in the tracts described in the foregoing, but this exclusion and exception according to the terms of the statute 'shall not be construed to include coal and iron lands.'

To have and to hold the said tracts with the appurtenances unto the said 'Oregon and California Railroad Company of Oregon,' and to its assigns forever with the exclusion and exception as aforesaid.

In testimony whereof, I, Benjamin Harrison, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the City of Washington, this, the third day of March, in the year of our Lord, One thousand eight hundred and ninety-three, and of the Independence of the United States the one hundred and seventeenth.

(Seal)

By the President, BENJAMIN HARRISON,
E. MACFARLAND, Asst. Secretary."

All other patents issued are in the same form, excepting that reference is not generally made in many of them to the Act of April 10, 1869, but does appear in this patent and in some others. There is a schedule showing the amount of land patented, compiled by years separately stated, and showing the Acts of Congress which are recited in such patents, attached to and made a part of the Joint and Several Answer of the Oregon and California Railroad Company, the Southern Pacific Company, and Stephen T. Gage,

marked Exhibit 11 (Vol. II., p. 1152) as hereinbefore set out at page of this statement.

It appears from the testimony (Vol. V., pp. 2404-2414, and Defendants' Exhibits 288, 336, 337, 338, Vol. XIII., p. 6835, and Vol. XIV., pp. 7303-7306), that under the provisions of the Act of July 25, 1866, the Oregon and California Railroad Company has continuously carried the property and troops of the United States, free of cost, between Portland, Oregon, and Roseville Junction, and has continued to do so from the first operation of the road as far as the same was constructed, and has at all times done so from the first operation of any portion of the constructed part of the road, and has done so as required by the United States in accordance with the provisions of the statute, and the requisitions of the United States made through its proper officers; and that this transportation in value amounted to the sum of \$315,828.34 (Defendants' Exhibit 288) between 1906 and 1910, and an estimated like amount prior to 1906, on so much of the road as lies between Portland and the Oregon and California state line; and for the entire line between Roseville Junction and Portland; the sum is more than \$1,250,000; and that all of said sums were on account of free movement of traffic for United States as required by the Act of July 25, 1866, section 5 (14 Stat. 239).

It also appears that from April 1, 1870, to April 30, 1911, the company had paid in taxes on these lands granted, the sum of \$1,827,234.10 (Defendants' Exhibit 289; and testimony of Robert Adams, Vol. V., p. 2137; J. B. Eddy, Vol. V., p. 2552; P. A.

Worthington, Vol. V., p. 2572; and Defendants' Exhibits 319, Vol. XIII., p. 7150; 320, Vol. XIII., p. 7167; 321, Vol. XIV., p. 7251; 331, Vol. XIV., p. 7263; 359, Vol. XIV., p. 7346); and that the total taxes paid on these lands from April 1, 1870, to April 30, 1913, is \$2,758,094.07. It also appears that the Company has expended in advertising these lands, \$34,784.85; in examining, cruising and grading these lands, \$142,651.40; in surveying fees to the United States, \$145,977.26; that it expended about \$2,500,000 between March 28, 1887, and January 3, 1888, in construction of 24.135 miles from a point one and one-half miles south of Ashland to the Oregon and California state line.

It also appears from Defendants' Exhibit 257 (Vol. XI., p. 5789, to and including Vol. XII., pp. 6037-6449), that it has sold and conveyed various parcels of these granted lands from 1873 to January 16, 1907, claiming to hold title in fee simple without particular regard to the Act of April 10, 1869, or Section 4 of the Act of May 4, 1870; and as shown by this exhibit, that deeds were executed and delivered to the various vendees, upon payment of the purchase price, and recorded by the vendees in the office of the County Recorder or County Clerk having charge of the Records of Deeds in the various counties in which the lands conveyed were situated; and that this record began about the time these conveyances were made from 1870 down to and including the year 1907; and that these records are public records under the recording acts of the State of Oregon. Each deed so recorded showed acreage sold and con-

sideration paid, and, in some instances, contracts of sale showing acreage sold and consideration paid, where recorded.

It does not appear that the United States, by its Department of Justice, or Department of the Interior, or its General Land Office, or any officer having jurisdiction over these lands while the roads were in process of construction or at any time, ever objected to the way and manner in which the company was administering the grants and disposing of its lands, or ever objected to the non-enforcement of the so-called "actual settler" clause, or that there was ever any correspondence directly relating to the same excepting the correspondence referred to between Attorney General Williams and Secretary Delano as hereinbefore set out; and it does not appear that Congress ever took any action to enforce the so-called "actual settler" clause or made any attempt to forfeit either of these grants for any breach of such "actual settler" clause, until the passage of the Resolution of April 30, 1908, under which this suit is being prosecuted. The attitude of the United States toward this subject as expressed by the opinion of Attorney General Devens, of date October 26, 1880 (16 Op. At. Gen. 572), being that the executive department of the Government could not take advantage of a breach of a condition subsequent in such a grant unless specifically authorized to do so by Congress. The defendants also claim waiver by operation of law, and implied repeal of the so-called "actual settler" clause of the Act of April 10, 1869, and Section 4 of the Act of May 4, 1870 (if such

“actual settler” clause is or ever was enforceable), by the passage of the following statutes:

(1) Act of May 3, 1875 (18 Stat. 519), the same being “An Act for the relief of settlers on lands within railroad limits”;

(2) Act of June 3, 1878 (20 Stat. 89), the same being “An Act for the sale of timber lands in the States of California, Oregon, Nevada and in Washington Territory”;

(3) Act of May, 3, 1879 (20 Stat. 472), the same being “An Act to grant additional rights to homestead settlers on public lands within railroad limits”;

(4) Act of January 31, 1885 (23 Stat. 296), the same being “An Act to declare forfeiture of certain lands granted to aid in the construction of a railroad in Oregon”;

(5) Act of September 29, 1890 (26 Stat. 496), the same being “An Act to forfeit certain lands heretofore granted for the purpose of aiding in the construction of railroads, and for other purposes,” commonly known as the “General Forfeiture Act”;

(6) Act of March 3, 1887 (24 Stat. 556), the same being “An Act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads and for the forfeiture of unearned lands, and for other purposes”;

(7) Act of March 3, 1891 (26 Stat. 1097), repealing the pre-emption law;

(8) Act of March 3, 1891 (26 Stat. 1093), the same being “An Act to amend section eight of an act approved March 3rd, 1891, entitled ‘An Act to repeal timber culture laws and for other purposes,’ ” com-

monly known as the Statute of Limitations;

(9) Act of March 3, 1896 (29 Stat. 42), the same being "An Act to provide for the extension of the time within which suits may be brought to vacate and annul land patents, and for other purposes";

(10) Act of March 3, 1891 (26 Stat. 1095-1099), the same being "An Act to repeal timber culture laws, and for other purposes," the same being a Statute of Limitations;

(11) Act of June 4, 1897 30 Stat. 11-35-36-37), the same being an Act providing for Forest Reserve lieu lands selections;

(12) The so-called "innocent purchaser" act (37 Stat. 320), entitled "An Act Supplementing the joint resolution of Congress approved April thirtieth, nineteen hundred and eight, entitled 'Joint resolution instructing the Attorney General to institute certain suits,' and so forth."

It also appears from the testimony (Vol. V., pp. 2443-2461), that the East Side Company commenced construction in East Portland on April 16, 1868, and that in July of that year the line of the road was laid out and more or less grading was being done, and groups of men were scattered along from place to place, covering a distance of several miles, extending between Hubbard and what is now Woodburn, and in the vicinity of Gervais, Marion County, Oregon; and that there was grading in the vicinity of that place, and there was grading also between Oregon City and Portland, scattered along from about Stark Street, in East Portland, approximately up to where the town of Gervais now is, about 13 or 14 miles from

Salem; and Mr. Gaston estimated the cost of this work done by the East Side Company, in the spring and summer of 1868 and up to February 1, 1869, at \$150,000 (Vol. V., p. 2423, Record). It also appears (Vol. XIII., pp. 6783-4, Record, Defendants' Exhibits 284-285), that the California and Oregon Railroad Company filed its assent within one year after the passage of the Act of July 25, 1866, as required by section 6 thereof, and also completed the construction of the first twenty miles of its road within the time required thereby.

It appears from the record that voluminous testimony has been offered, oral and documentary, on behalf of the defendants-appellants, tending to show that these lands involved in suit (where they have any value) are chiefly valuable for timber, and that they are unfit for and incapable of settlement, and are unfit for any agricultural, horticultural or other such use; that it would cost from fifty to five hundred dollars per acre to remove the timber and stumps and render the lands fit for cultivation or any settlement purpose, even where there is sufficient soil or where conditions by reason of elevation or topography would permit cultivation or use.

There is voluminous testimony on the part of the Government tending to show that the major portion of these lands covered with timber, involved in this suit, are, when the timber has been removed and the lands have been cleared by grubbing the stumps and burning the brush, fit for cultivation and settlement and would thereby be adapted to agricultural, horticultural and other such uses, and that the soil of the

major portion of these lands thus covered with timber, when the timber has been removed, is suitable for such settlement purposes.

The status of these grants also appears from Defendants' Exhibit 258 (Vol. XIII, pages 6691-6698) as follows:

B. A. McA., May 11, 1912.

Status, as of date May 1, 1912, of that part of the grant situated in Oregon, made by act of Congress approved July 25, 1866, to the California and Oregon Railroad Company, and to "such company organized under the laws of Oregon as the Legislature of said State shall designate,"—known in Oregon as the "East Side Grant."

Total acres in Primary	
Limits	3,823,426.71
Acres Lost for which the	
Company is entitled to	
indemnity.	
Corvallis & Yaquina Bay	
Wagon Road Grant	
July 4, 1866	12,687.85
Willamette Valley & Cas-	
cade Mountain Wagon	
Road Grant July 5,	
1866	19,577.45
Oregon Central Military	
Wagon Road Grant	
July 2, 1864	26,398.36
Donation Land Claims..	1,143,925.70
Swamp Lands	240.98
State Selections	74,288.56

Private Entries	407,486.27	
Mineral Entries	9,516.60	
Fort Lane Military Reser- vation	113.24	

1,694,235.01

Acres Lost for which
Company is not entitled
to indemnity.

Roseburg & Coos Bay
Wagon Road Grant
March 3, 1869.

These lands inured to the Railroad Grant but were erroneously pat- ented by the U. S. to the Wagon Road Com- pany and Railroad Company has no re- course	33,814.40	1,728,049.41
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Acres which have inured to the Grant Patented..	1,795,664.71	
Patents applied for.....	20,366.38	
Patents not yet applied for—Surveyed	51,732.21	
Patents not yet applied for—Unsurveyed	227,974.00	2,095,377.30

Total Acres in Indemnity Limits		1,791,523.13
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Acres Lost.	
Indian Reservation	845.68
Corvallis & Yaquina Bay	
Wagon Road Grant . . .	37,824.72
Willamette Valley and	
C a s c a d e Mountain	
Wagon Road Grant . . .	37,833.01
Oregon Central Military	
Wagon Road Grant . .	22,321.84
Roseburg & Coos Bay	
Wagon Road Grant . . .	26,771.59
Donation Land Claims..	55,874.26
Swamp Lands	1,672.30
State Selections	31,947.68
Private Entries	81,062.21
Private Entries Pending.	3,237.40
Mineral Entries	600.86
Oregon Central R. R. Co.	
(West Side Co.) Pri-	
mary Patents.	3,409.07
Northern Pacific R. R.	
Co. Lieu Selections Pat-	
ented.	15,538.94
Northern Pacific R. R.	
Co. Lieu Selections	
Pending	7,915.68
	<hr/>
	326,855.24

Acres Reserved by U. S.

National Forests 490,327.88

Klamath Irrigation pro-

ject 645.95

490,973.83 817,829.07
Acres which have inured
to Grant.

Patented 955,045.51

Patents applied for..... 4,296.09

Selected — not certified —

may be rejected 5,710.46 965,052.06

Acres which are available
for future selection—

Unsurveyed 8,640.00 8,640.00

Acres Primary Lost
which Company is en-
titled to indemnity

1,694,235.01

Acres Indemnity Pat-
ented and Patents

Applied for 965,052.06

Acres Indemnity available

for future selection.... 8,640.00 973,692.06

Acres Primary Lost for
which no Indemnity is
available

720,542.95

Acres Primary Lost on ac-
count of error in U. S.
General Land Office

whereby patent issued for Roseburg and Coos Bay Wagon Road	33,814.40
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Total Deficit in Grant	754,367.35
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If National Forest Lands Could be selected	490,327.88
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The deficit would be re- duced to	264,029.47
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Status, as of date May 1, 1912, or grant made by act of Congress approved May 4, 1870, to Oregon Central Railroad Company,—known as “West Side Grant.”

Total area in Primary Limits	501,807.38
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Acres Lost for which the
Company is entitled to
indemnity.

Donation Land Claims . . .	197,692.94
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Swamp Lands	997.42
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State Selections	9,680.15
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Private Entries	37,238.01
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Oregon and California R.

R. Co., Primary	14,204.31
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Oregon and California R.

R. Co., Indemnity Selec- tions and Patents	41,190.76
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Acres Lost for which the Company is not entitled to Indemnity	301,003.59
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Quadrant	103,730.16	404,733.75
Acres which have inured to grant Patented	96,844.98	
Patents applied for.....	128.97	
Patents not yet applied for	99.68	97,073.63

Total Acres in Indemnity Limits		123,907.97
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Acres Lost.

Donation Land Claims..	7,347.18	
Swamp Lands	97.31	
State Selections	6,924.93	
Private Entries	12,842.70	
Quadrant	58,853.18	
Northern Pacific R. R. Co. Lieu Selection	40.	86,105.30

Acres which have inured
to Grant.

Patented	37,788.67
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Acres which are available
for future selection.

Unsurveyed	14.00
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Acres of Primary Lost for which Company is en- titled to indemnity.....	301,003.59
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Acres Indemnity Patented	37,788.67
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Acres of Indemnity which

are available for future

Selection	14.00	37,802.67
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Acres of Primary Lost

for which no Indemnity

is available	263,200.92
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It appears as shown by Defendants' Exhibit 276 (Vol. XIII, pages 6721-6775) that selection lists were certified, approved, and lands patented continuously from July 28, 1870, as to selection lists and 1891 as to first patent, down to February 2, 1905, and that these selection lists were acted upon by the Commissioner of the General Land Office, patents issued by the direction of the President of the United States, and delivered to the Oregon and California Railroad Company as conveying or evidencing title to the lands, and for all purposes for which patents of the United States are customarily issued.

Oregon and California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, the defendants-appellants, contend in substance:

(1). That the Act of July 25, 1866, vested the title of the East Side grant in the East Side company as of date October 20, 1868, when it was designated by the Legislative Assembly of the State of Oregon, at the request of the Company, pursuant to the Act of July 25, 1866, and that this title took effect as of date July 25, 1866, and could not be affected by the provisions of the Act of April 10, 1869, or the title thereby granted debased by the proviso of the last mentioned act, known as the "actual settler" clause.

(2). That, assuming that the Act of April 10, 1869, and section 4 of the Act of May 4, 1870, is enforceable and applies to such lands as are adapted to settlement, and that the "actual settler" clause has not been abrogated or waived by legislation or estopped, the Acts of Congress of July 25, 1866, and May 4, 1870, were passed for the primary purpose of constructing a railroad as a national highway, and were not passed for the purpose of promoting the settlement of the public lands; and that any provision in the Act of April 10, 1869, or the Act of May 4, 1870, for the benefit of settlers, must be taken in subordination to this primary purpose, and must give way until the discharge of the obligations incurred by sale or redemption of bonds issued for constructions funds for construction of roads.

(3). That the settlement clause of the Act of April 10, 1869, and of section 4 of the Act of May 4, 1870, is not a condition subsequent.

(4). That Congress was without lawful authority on April 10, 1869, to annex a new condition, by amendment or otherwise, to the land grant made by the Act of July 25, 1866, for the reason that the California and Oregon Railroad Company filed its assent within one year, and completed the first section of 20 miles of said railroad within two years after the passage of the act, and had the right to earn the entire grant made of the lands from Roseville Junction, California, to Portland in Oregon; and for the further reason that neither the California and Oregon Railroad Company nor the East Side company was in default on April 10, 1869.

(5). That the so-called "actual settler" clause in the Act of April 10, 1869, and section 4 of the Act of May 4, 1870, construed so as to give effect to the primary policy of Congress and to carry out the purpose of the granting acts in the light of long continued, contemporaneous, and permitted construction of these acts, as evidenced by the record, and subsequent legislation of Congress relating to land grants and public lands, did not create a condition subsequent.

(6). That the United States has waived its right to enforce the so-called "actual settler" clause, assuming that its words create a condition subsequent, and it has so waived its right by long-continued acquiescence and affirmative action and legislation with full knowledge of continued breaches by the company, from the earliest administration of the grants to the passage and enforcement of the Act of August 20, 1912; and that the United States is estopped, in view of all the facts and circumstances, to enforce the "actual settler" clause, whether a condition subsequent or a covenant or trust.

(7). That a condition subsequent must be not only express or implied, but legal, definite, and certain, and reasonably possible of performance, and not repugnant to the nature of the estate to which it is annexed. And in the absence of express limitation, a condition subsequent must be capable of performance within a reasonable time, and continually and regularly kept thereafter; and that if, within a reasonable time after the title vested in the company to any part of these lands, the company could not sell

them to "actual settlers" for the price named, in the quantities specified, the condition became impossible of performance and was thereby discharged; and that the same result would follow where performance of the condition was rendered impossible, or its performance by the company made practically impossible by legislative enactment by the United States; and that the proof shows that there was at no time since the title vested in the company, practical ability, or possibility, to sell these lands to "actual settlers" for the price named, in the quantities specified, because of the character of the granted lands, their situation and location, and because they were unfit for disposition under the settlement laws, in accordance with the terms of the condition; and that, therefore, the condition has become impossible of performance and has been discharged.

(8). That the terms of the "actual settler" clause are so indefinite and uncertain as that the company could not, under its terms, fairly construed, ascertain the legal measure of its duty so as to perform the same; and that the "actual settler" clause must fail of enforcement unless it is construed to apply to that period of time between the date of the Act and the construction of sections of road, the acceptance of the same, and the direction of the President to issue patents for lands earned by such construction.

(9). That the "actual settler" clause is repugnant to the grant and could not have been enforced without destruction of the primary and dominant purpose of Congress to aid in the construction of road.

(10). That the "actual settler" clause, if ever enforceable, should be limited to "actual settlers" who went upon the lands prior to the issuance of patents, or at least prior to the time when the President approved the reports of the Commissioners who examined the sections of constructed road and directed patents to issue.

(11). That when patents issued, that was a determination that the "actual settler" clause no longer applied to the lands thereby conveyed, excepting as to such settlers as may then have been upon the lands under the provisions of the act.

(12). That the Statute of Limitations applies to this suit, and that as to all lands patented more than five years prior to the commencement of suit which were issued prior to March 2, 1896, the suit is barred; and as to all lands for which patents issued after that date, barred within six years thereafter; that the Act of March 3, 1891 (26 Stat. 1095) and the Act of March 2, 1896 (29 Stat. 42), read in connection with the Act of September 29, 1890 (26 Stat. 496), are more than mere statutes of limitations. They vest or quiet title in fee simple, without condition or possibility of reverter.

(13). That the Oregon and California Railroad Company by the deed made to it in March 29, 1870, by the East Side Company and by the deed of October 6, 1880, made by the West Side Company and patents issued, is a bona fide purchaser of all the lands granted; and that the Union Trust Company, under its mortgage of July 1, 1887, is likewise a bona fide purchaser, and that the one owns the land

in fee simple and the other owns and holds a valid lien thereon,—each free from any right to enforce the so-called “actual settler” clause as to any of the lands involved in suit.

The Union Trust Company of New York, appellant, in substance, contends:

(1) That the proviso in the Act of 1869 applies only to lands susceptible to actual settlement and cultivation and does not include timber lands; that the words “actual settlers” mean persons actually in cultivation of the land at the time the Act took effect, and that the proviso as to actual settlement, if prospective, is limited to lands susceptible to actual settlement and cultivation; and that if the scheme of the proviso of 1869 was, that the granted lands were to be disposed of by the railroad company in analogy to the manner in which similar lands were disposed of by the Government, then timber lands were not within the purview of the proviso; that the construction placed upon the proviso by the Land Department and other officers of the Government for many years was, that it did not apply to timber lands or lands not susceptible of cultivation, and that this construction is consistent with the purposes of the grant.

(2) That the last proviso in the Act of 1869, as construed by the court below, is void because in restraint of alienation.

(3) That the last proviso of the Act of 1869 was not intended to create, and did not create, a condition subsequent.

(4) That the proviso of the Act of 1870, respect-

ing actual settlers, was not a condition subsequent.

(5) That the provisions of the Act of 1869 and of the Act of 1870 respecting actual settlers are restrictive covenants, and if enforceable at all are enforceable in a court of equity only as to lands suitable for settlement and cultivation.

(6) That no evidence was submitted of a breach of the provisions of the Act of 1869 or of the Act of 1870 regarding actual settlers, whether they be regarded as conditions or covenants, which justifies the decree of the court below or requires any decree in favor of the complainant.

(7) That the Union Trust Co. is a bona fide purchaser under its mortgage of July 1, 1887, of all the lands involved in suit, and that the United States is estopped to insist upon the performance of the "actual settlers" clause until such mortgage shall have been discharged by sale of the lands covered by said mortgage.

The United States, appellee, in substance, contends:

(1) That although the title to the **granted lands** under the Act of July 25, 1866, passed out of United States prior to April 10, 1869, it did not find lodgment in the East Side Company until after the passage of that Act, and that the doctrine of relation does not apply; that the title was in the West Side Company until it was renounced by that company in 1870; that filing of assent under the Act of April 10, 1869, and acceptance of grant in the manner provided by the Act of July 25, 1866, pursuant to the Act of April 10, 1869, was necessary to vest that title

in the East Side Company; that in any event, the Oregon and California Railroad Company, is estopped under its resolution of June 8, 1869, accepting the provisions of the Act of July 25, 1866, and of all acts amendatory thereof, and filing the same—to deny the validity of the Act of April 10, 1869, and the effectiveness of the “actual settler” clause therein, and that Congress had power under Section 12 of the Act of July 25, 1866, to amend the grant and afterward exercised that power, at the request of the East Side Company.

(2) That under the rules of construction and the situation as disclosed in the Congressional debates and history of the “public land” laws and the Acts making grants of public land to railroad companies about that time, the “actual settler” clause in each Act is a condition subsequent.

(3) The record shows breaches of the conditions subsequent by sales of granted lands under each of these Acts; that is, unlawful sales in excess quantities and at excess prices, and to persons other than actual settlers, and conveyances by way of trust deeds and mortgages, as disclosed by the evidence.

(4) The breaches alleged and proven have not been waived by the United States in this: that waiver necessarily implies knowledge of the right and intention to relinquish that right, and that mere silent acquiescence in breaches of a condition does not constitute a waiver of such breaches, or of the condition, and that mere waiver of breaches of a condition will not constitute a waiver of the condition itself, and that no one but Congress can waive a breach of a

condition in a Congressional grant; that constructive notice of alleged breaches is ineffectual.

(5) That the suit is not barred by the statute of limitations, or the "actual settler" clause waived by the issuance of patents.

The Cross Complainants and Interveners, appellants, in substance, contend:

(1) That the words of the "actual settler" clause in the Act of April 10, 1869, and in section 4 of the Act of May 4, 1870, create an enforceable trust and constitute the Railroad Company trustee holding the legal title of these lands for the benefit of actual settlers who have gone upon the land, as contended by the Cross-Complainants or actual settlers who, in good faith, may apply to purchase and enter upon the lands, as contended for by the Interveners.

(2) That the United States, having created the trust in the granted lands, having accepted the benefits from the construction and operation of the road, and having offered these lands through its trustee for sale to actual settlers, cannot be held to claim a forfeiture of any portion of the trust estate, but should be required to assist in enforcing and to enforce the terms of the trust in its name for the benefit of such actual settlers.

(3) That the United States by its acquiescence in the sales made by the Company in violation of the terms of the trust, and by its issuance of patents for lands sold in violation of the terms of the trust, and by inducing actual settlers to qualify as such under the terms of the trust, is and ought to be estopped from asserting any demand for forfeiture, and should

be held to its duty of compelling specific performance for the benefit of qualified purchasers who have acquired an equitable interest in the lands applied for.

(4) That the Railroad Company having accepted all the terms of the grants with the conditions and limitations attached thereto, should not be allowed to claim any greater rights in the trust estate than is created by the law; that is, \$2.50 per acre for each acre of the land granted which it could or might sell for that price.

(5) That each of the Cross-Complainants and each of the Interveners is entitled to a decree in this cause, of specific performance of the trust agreement created by the "actual settler" clause and the application of the actual settler to purchase and settle upon the lands applied for.

(6) That the words of the "actual settler" clause do not create an estate upon condition, or a condition subsequent.

Under these contentions and this statement of facts, it appears that the decision of the case on appeal depends substantially upon the proper construction of these land grants, speaking generally, and of their proper construction as to these specific lands, depending upon their character as to whether they are essentially timber lands and chiefly valuable for timber and unfit for actual settlement, or for any settlement purpose, and whether the "actual settler" clause has been waived or repealed, or the United States is estopped to enforce the same. The questions involved are of general importance and of great public interest and affect the rights of a numerous

class of persons as well as the immediate parties to the litigation. In view of such circumstances and the necessity for a speedy determination by final authority, and the very grave importance and intricacy of the questions of law involved, the following questions are hereby certified to the Supreme Court of the United States for its decision:

Questions of Law Concerning Which the Circuit Court of Appeals Desires the Instruction of the Supreme Court for Its Proper Decision.

1. Was it the primary meaning and purpose of the Act of July 25, 1866, to aid in the construction of a railroad between the points therein named, by the mortgaging of the lands granted in aid of such construction, with the attendant right to make sales and apply the proceeds thereof in redemption of the mortgage indebtedness?

2. Do sales to settlers as contemplated by the Amendment of April 10, 1869, at the prices and in the quantities mentioned in said Amendment, represent a secondary and subsequent purpose, effective in relation to the granted lands, only after the same have first been applied in aid of the construction of the railroad by sales thereof and the payment of the proceeds of such sales in redemption of the mortgage indebtedness incurred for the construction of the railroad?

3. Was it the primary meaning and purpose of the Act of May 4, 1870, to aid in the construction of a railroad between the points therein named, by the mortgaging of the lands granted in aid of such construction, with the attendant right to make sales

and apply the proceeds thereof in redemption of the mortgage indebtedness?

4. Do sales to settlers as contemplated by Section 4 of the Act of May 4, 1870, at the prices and in the quantities mentioned in said section, represent a secondary and subsequent purpose, effective in relation to the granted lands, only after the same have first been applied in aid of the construction of the railroad by sales thereof and the payment of the proceeds of such sales in redemption of the mortgage indebtedness incurred for the construction of the railroad?

5. Did the Act of Congress of April 10, 1869, which reads as follows:

“Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section six of an an act entitled, ‘An act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California, to Portland in Oregon,’ approved July twenty-fifth, eighteen hundred and sixty-six, be, and the same hereby is, amended so as to allow any railroad company heretofore designated by the Legislature of the State of Oregon, in accordance with the first section of said act, to file its assent to such act in the Department of the Interior within one year from the date of the passage of this act; and such filing of its assent, if done within one year from the passage hereof, shall have the same force and effect to all intents and purposes as if such assent had been filed

within one year after the passage of said act; *provided*, that nothing herein shall impair any rights heretofore acquired by any railroad company under said act, nor shall said act or this amendment be construed to entitle more than one company to a grant of land; *And provided, further*, that the lands granted by the act aforesaid shall be sold to actual settlers only, in quantities not greater than one quarter section to one purchaser and for a price not exceeding two dollars and fifty cents per acre'';

and the resolution of acceptance by the defendant Oregon & California Railroad Company, which was dated April 4, 1870, together operate to constitute: (a) a condition subsequent, or (b) a trust, or (c) a covenant enforceable by specific performance at the suit of the government or of any person entitled to the benefit of it, or (d) a regulative, directory, non-enforceable covenant, or (e) a negative covenant imposed upon the railroad company that in making sales of the granted lands it would sell the same to nobody except actual settlers in the quantities and at the prices mentioned in the Act of April 10, 1869, and enforceable by injunction restraining the railroad company, in the event that it elected to make sales of the granted lands, from making such sales to anybody except actual settlers, and at the prices and in the quantities mentioned in said act?

6. Did Section 4 of the Act of Congress of May 4, 1870, which reads as follows:

“That the said alternate sections of land granted by the act excepting only such as are necessary for the company to reserve for depots, stations, side tracks, wood yards, standing ground, and other needful uses in operating the road shall be sold by the company only to actual settlers, in quantities not exceeding one hundred sixty acres or a quarter section to any one settler and at prices not exceeding two dollars and fifty cents per acre”;

and the resolution of acceptance by the Oregon Central Railroad Company, which was dated July 2, 1870, together operate to constitute (a) a condition subsequent, or (b) a trust, or (c) a covenant enforceable by specific performance at the suit of the government or of any person entitled to the benefit of it, or (d) a regulative, directory, non-enforceable covenant, or (e) a negative covenant imposed upon the railroad company that in making sales of the granted lands it would sell the same to nobody except actual settlers in the quantities and at the prices mentioned in the Act of May 4, 1870, and enforceable by injunction restraining the railroad company, in the event that it elected to make sales of the granted lands, from making such sales to anybody except actual settlers, and at the prices and in the quantities mentioned in said act?

7. Does the actual settler clause in the Act of April 10, 1869, and in Section 4 of the Act of May 4, 1870, create an enforceable trust, and constitute the railroad company a trustee to hold the legal title to the lands for the benefit of actual settlers who have

gone upon the lands since the date of the grant?

8. Is the actual settlers clause in the Act of April 10, 1869, and in section 4 of the Act of May 4, 1870, limited to persons who may have been upon the lands as actual settlers prior to the issuance of the patents for the lands earned by construction?

9. Did the issuance and delivery of patents by the United States, to the Oregon and California Railroad Company, for the lands described therein, determine that the actual settler clause no longer applied to the lands thereby conveyed?

10. Does the proviso of the Act of April 10, 1869, or of Section 4 of the Act of May 4, 1870, apply to any lands other than those susceptible of actual settlement and cultivation and do they apply to or include timber lands which are chiefly valuable for timber?

WILLIAM B. GILBERT,

ERSKINE M. ROSS,

WM. W. MORROW,

United States Circuit Judges of the Ninth Judicial
Circuit and Judges of the United States Cir-
cuit Court of Appeals for the Ninth Circuit.